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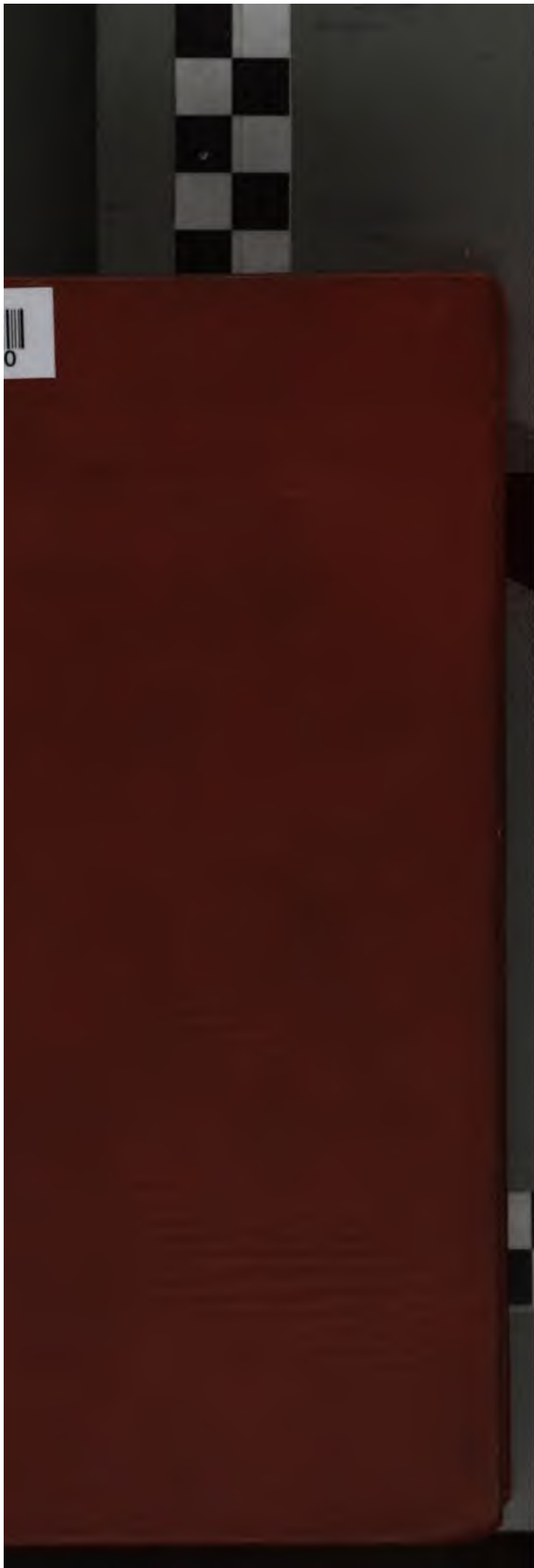
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THE  
ADMINISTRATION OF JUSTICE  
UNDER  
MILITARY AND MARTIAL LAW,

AS APPLICABLE TO

*The Army, Navy, Marines, and Auxiliary Forces.*

BY CHARLES M. CLODE,  
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

~~~~~  
"Justice ought to bear rule everywhere, and especially in armies: it is the only means to settle order there, and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it be intended that the soldiers should be kept in their duty and obedience."—*The Art of War*, by LOUIS DE GAYE, in 1678.  
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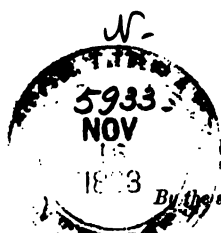
[*Recommended to the Army, by General Orders*  
97 of 1872 and 32 of 1873.]

SECOND EDITION, REVISED AND ENLARGED.

LONDON:  
JOHN MURRAY, ALBEMARLE STREET.

1874.

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**THE HISTORY OF THE ADMINISTRATION AND  
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W. & A.  
CLAY  
LONDON

## PREFACE.

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IN presenting this Work to the notice of the Public, I desire to explain, in a few sentences, the circumstances under which it appears, and the purpose which it is intended to serve: hoping in this explanation to satisfy the Reader that this is not a time inopportune for the publication of a Book on "Military and Martial Law."

When the Royal Commissioners on Courts-martial presented their Report to the Crown, they remarked upon the necessity for further information upon the Administration of Military Law. Since the date of that Report, no Work of any kind has appeared; though many Legal and Constitutional changes have followed upon the Army Regulation Act of 1871, and the War Department has prescribed to the Officers in the Regular and Auxiliary Forces the study of Military Law, as an essential qualification for promotion. The necessity, which was apparent in 1868-9, has therefore become urgent in 1872.

It is with the desire of facilitating the acquisition of such knowledge that this Work has been undertaken; and, with this object, I have thought it expedient to collect together in one Volume, all the information—so far as it relates to Court-martial practice—that a Subordinate Officer would desire for the study, or a Superior Officer for the Administration, of Justice in the Army.

The method I have pursued, is to present to the Reader all the materials relating to the Military Code prior to the Mutiny

Act of 1689, which, though coming within my official cognizance, have hitherto escaped observation; being persuaded—apart from the historic value which may attach to this information—that to an officer Administering the Law of 1872, it is no ordinary satisfaction for him to know that it rests upon a foundation which the experience of two hundred years and upwards has sanctioned.

The Military Code which was adopted by each of the contending parties of the Great Rebellion for the government of their armies was nearly identical in words; and became, in the next reign, the substance of Prince Rupert's Code of 1672.

This, in its turn, became the common parent of the two Codes now regulating the Regular and Marine Forces of Her Majesty; while the Armies of the United States—first in 1775, and again in 1806—have been, and now are, governed by a Code remodeled on the basis of our Mutiny Act and Articles of War then extant.

The early Law of the English Army is, therefore, not a matter solely of National interest; but the able writers on the Military Law of the United States will (if I mistake not) take an interest equal to our own in this subject.

Passing from the consideration of the Law before, I have followed up the subject of the Law after, the Mutiny Act, dwelling upon that, not as a judicial, but as a political measure—as one showing how, with the Crown and the two Houses of Parliament united in Council, the Army can be made subservient to the National will, and kept within the bounds of political expediency.

Prefaced by this information, the practical administration of the Law becomes intelligible; and in the history of the Code and of each Amendment we find the reasons for many of those provisions which are of great practical utility. The dry bones, so to speak, of the Mutiny Act and Articles of War, otherwise so distasteful to the Student, become habilitated with

the fragments of Military and Constitutional history, and an interest is created in the various Sections and Articles of the Code which could not otherwise be felt.

In this manner I have endeavoured to give—as I acquired myself—an interest in the Military Code. For many years its early records have been my daily though silent companions; and, for the pleasure which their study has given me, I should be ungrateful indeed if I did not invite attention to their existence, and cite their authority as opportunity offers. Out of their treasure-house has come a system, which in the Army—like that of chivalry in Europe—has “kept alive, even in Servitude itself, the spirit of an exalted Freedom;” and I shall think myself fortunate, if anything here recorded should either aid those in Military authority to execute Justice and to maintain truth in the Army which they have been appointed to command, or induce others not in authority but who advocate change, to consider whether it would not be a wise policy to let well alone, rather than improve away a system which, after two hundred years’ experience, is found to “have the confidence of the Army,” and to be well spoken of by those who have suffered under its punishments.

LONDON, 5th July 1872.



## PREFACE TO SECOND EDITION.

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IN preparing the present Edition for publication, I have endeavoured to make the Work more deserving of the confidence with which the first Edition has been received by the Military authorities,<sup>1</sup> and to render the contents more available for the use of Officers administering Military Justice.

With the first object in view, I have gone carefully through the General Orders and Despatches (Civil as well as Military) of the late Duke of Wellington, and have added many references in the Foot-notes to points of Military procedure ruled by him. In a Note to the Chapter on "Martial Law" I have placed an Extract from one of his Despatches from Ireland, stating the

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<sup>1</sup> Horse Guards, War Office, 14th November 1872.

MY DEAR SIR,

I have no doubt that the work you have just published on "The Administration of Justice under Military and Martial Law" will be of very great service to the Officers of the Army, and I will take care to have it added to the list of books recommended in paragraph 285 of the Queen's Regulations in the next monthly issue of General Orders.

Most faithfully yours,

RICHARD AIREY.

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Head-quarters Armies of the United States,  
Washington, D.C., Oct. 5, 1872.

MY DEAR SIR,

On my arrival here from abroad I found your volume entitled 'Administration of Justice under Military and Martial Law.'

I thank you not only for the kindness which influenced you in sending me the volume, but for the contents of it. It puts the matter in so convenient a shape, and excels other works on Court-martial, in that it traces Military usages through a period of England's history when Military Law was not treated with the slight that writers on Civil Jurisprudence are wont to do. Our own laws are based on the English Mutiny Act, so that your book will be as applicable to us as to your Colonies, and I hope to study it more closely than I have had time to do as yet.

With great respect,

Your obedient Servant,

Charles M. Clode, Esq.,  
War Office, London.

W. T. SHERMAN,  
General.

requirements which, in defending the country against invasion, he thought the General Officer in Command would have to impose upon the Civil population.

Further, I have examined the decisions on Military Law and Court-martial Procedure, which are to be found in the American Law Reports; and I have incorporated into the Text of the Work the rulings of the American Judges on points apposite to our Military Law and Procedure.

By the courtesy of the Solicitor<sup>1</sup> to the Admiralty, I have had the advantage of perusing the Opinions of the Law Officers of the Crown<sup>2</sup> given to that Department on Court-martial cases from the year 1785—which Opinions have furnished me with many additional references in support of the text, and have enabled me to give a “History of the Naval<sup>3</sup> Code,” and to extend the work to the administration of Military Law under that Code. To one opinion, which I have printed *in extenso*,<sup>4</sup> I would call especial attention, as raising the important question whether a combatant has the right of inflicting summary and condign punishment on a prisoner of War breaking his parole.<sup>5</sup>

I have also perused the Opinions of the same authors given to the late E. I. Company<sup>6</sup> on Military Law, and from the “Indian Articles of War” which govern the “Native Troops” I have extracted such information as may be needed by an European Officer placed in command over them.

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<sup>1</sup> A. R. Bristow, Esq., formerly M.P. for Kidderminster.

<sup>2</sup> These Opinions given to the W. O. (from 1694 in the *Miscellany Books* to the present date) and to the Admiralty and India Office, are usually cited here or in the “Military Forces,” as L. O. (W. O.), Vol. I., II., III., and IV. (Old Series); I., II., III., and IV. (New Series); Bks. A, B, C, D, E, F, G, H, I, and J; L. O. (Admiralty), Vol. I., II., III., and IV. The India Office cases are not bound but numbered only.

<sup>3</sup> Chap. III.

<sup>4</sup> Appendix K.

<sup>5</sup> I may also observe, as the matter appears to have raised some controversy, that in Courts-martial held under these Articles or under Secs. 99 and 101 of the Mutiny Act, the reception of evidence must be regulated by the “Indian Evidence Act, 1872,” though whether the same rule should prevail in other Courts held in India under the 3rd Section of the Mutiny Act, does not appear to be equally clear.

With the other object in view, I have re-arranged the matter which formed the four Chapters of the former Edition, by separating the History of the Code<sup>1</sup> from that relating to Military Government,<sup>2</sup> Military obligation,<sup>3</sup> and Military procedure<sup>4</sup> and jurisdiction; while I have placed the History of the Militia Government in a separate Chapter,<sup>5</sup> in which will be found the information to which the Officers of the Army were referred by paragraph 2 of General Orders 132 of 1873, and clause 23 of Auxiliary and Reserve Forces Circular of 1873.

To secure both objects, I have obtained for the reader the advantage of Mr. De Burgh's revision of his Note "on Evidence," which (at the suggestion of many friendly critics) he has considerably enlarged. The text of the whole Work has been carefully revised, and the legislation and Queen's Regulations of 1873 have been incorporated therein.

Having regard to the probability of the Military Code coming under the notice of Parliament for the purposes of revision and consolidation, I have carefully compared the present with the earlier Mutiny Acts and Articles of War, and noted in the Appendix several Amendments that have been made in various years with their dates, so that the history of each Section or Article may be easily traced by any one anxious for such information.

Lastly, I have added a summary of the Law as to the responsibility resting upon the Civil and Military authorities acting together in the suppression of such "Riots and Tumults," as, though grave, fall far short of "Rebellion."

LONDON, *January* 1874.

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<sup>1</sup> Chap. I. and II.

<sup>4</sup> Chap. VII.

<sup>2</sup> Chap. IV.

<sup>3</sup> Chap. VI.

<sup>5</sup> Chap. V.

## ARTICLES OF WAR REFERRED TO IN THIS WORK.

Date.	By what authority proclaimed.	Place of custody.	Printed or referred to in
1629.	Charles I.	Record Office., MS.	Vol. I. p. 18.
1639.	Lord Arundel.	{ Royal Artillery Library, Woolwich.	Vol. I. p. 429.
1640.	Duke of Northumberland.	{ Same.	Vol. II. p. 107.
1642.	Lord Essex.	Same.	Vol. I. p. 442.
1662-3.	Lord Albemarle.	'	Vol. I. p. 53.
1666.	Same.	'	Vol. I. p. 446.
1672.	Prince Rupert.	{ W. O., purchased from a (Bristol) Pensioner in 1858-9.	
1685.	James II. during Re- bellion.	{ British Museum.	
1686.	James II. after Re- bellion.	{	Grose, Vol. ii. p. 139.
1717. <sup>2</sup>	George I.	British Museum.	{ Com. Journ., Vol. xviii. p. 710.
1718.	Same.	British Museum.	
1720.	Same.		{ W. O. MS. Bk. 523, p. 116.
1722.	Same.	British Museum.	
1742.) 1748.)	George II.	MS. in W. O.	
1749.		{ A Vol. with Mutiny Act and Arts., W. O. (Solicitor.)	
1750 } to } 1799.)		MS. in W. O.	
1800 } to } 1872.)		{ MS. and printed copies in W. O.	

<sup>1</sup> Copies (MSS.) were found in the Solicitor's Department of the W. O. by Mr. Hawkins, in 1868; but I have never traced the originals.

<sup>2</sup> The Arts. of War published in the reigns of William III. and Anne are traceable on the Court-martial proceedings of those reigns (see Vol. I. pp. 502, 503). Bruce, when writing, in 1717, his work on 'Military Law,' had the Arts. of Anne before him. (See p. 308, quoted Art. 52.) Those of William III., during the Dutch war, I remember to have seen in the W. O. Books.

<sup>3</sup> These signed by the Sovereign, and formerly kept in the basement of this building, were brought to my notice in 1862. The Arts. of each year were written on folio paper with a marble cover, and a white label pasted on to indicate the year. This label (as the only indication of date) has been preserved, but the Arts. have since been bound in 4 vols., and placed in the Solicitor's Room, W. O.

On the 10th Feb. 1748,<sup>1</sup> the Commons moved an Address to His Majesty that there be laid before the House copies of all Arts. of War made in the reigns of Charles II., James II., William and Mary, and William, Anne, George I., and his then present Majesty (George II.). In reply to which Address the Secretary at War laid before the House :—

For these years. A.D.	Copies of
1721 to 1737. 1739 to 1740. 1742 to 1744.	{ Rules and Arts. for the better Government of His Majesty's Horse and Foot Guards in Great Britain and Ireland and Dominions beyond the Sea.
1742 to 1745, 1747.	
1748 and 1749.	
	Rules, &c., of the Forces employed in Foreign Parts.
	{ Rules and Arts. for the better Government of His Majesty's Horse and Foot Guards, and all other His Forces in Great Britain and Ireland and Dominions beyond the Seas and Foreign Parts. <sup>2</sup>

*Works on Military Law and Discipline cited.*

'Pallas Armata,' by Turner. Written 1670-1; published in London, 1683.

'Art of War,' by Lord Orrery, 1677, London.

'Art of War,' by De Gaya, 1678, London.

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(Bland's work was published in 1722.)

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John Mawson's 'Records of the Indian Command of General Sir Charles Napier, G.C.B.,' Calcutta, 1851.

Other works referred to, but not cited :—

'Military Law,' 1810, London. Samuel's 'Military Law,' 1816, London.

James's 'Court-martial,' 1820, London. 'Kennedy,' 1824, Bombay. 'Law

Magazine,' vol. xiv. pp. 1-30, London. Hough's 'Military Law,' 1855, London.

Griffith's 'Notes,' 1841, Woolwich. D'Agular's 'Courts-martial,' 1843, Dublin.

'The Military Laws of the United States,' by Callan, 1858, Baltimore.

<sup>1</sup> 25 Com. Journ., pp. 736, 738, 740, 742.

<sup>2</sup> Except for 1720, 1742, and 1748, I am unable to trace either copies or originals now existing in the War Office.

# LIST OF STATUTES REFERRED TO.

	Page		Page
Richard II. cap. 2 .. .. .	83	1 George II. cap. 34 .. .. .	24
15 " " 3 .. .. .	41	11 " " 2 .. .. .	244
31 Henry VIII. cap. 8 .. .. .	29	21 " " 6, sec. 4 .. .. .	280
1 Edward VI. cap. 12 .. .. .	354	22 " " 5 .. .. .	30, 130, 173
2 & 3 " " 2, sec. 8 .. .. .	87	22 " " 5, sec. 6 and 7 .. .. .	296
5 & 6 " " 11 .. .. .	354	22 " " 23 .. .. .	44
5 & 6 Philip and Mary, cap. 3 .. .. .	87	22 " " 33 .. .. .	42, 129
21 James I. cap. 4 .. .. .	243	23 " " 4, sec. 5 .. .. .	130
12 Charles II. cap. 15 .. .. .	13, 49	24 " " 6, sec. 8 .. .. .	173
13 " " 9 .. .. .	42	27 " " 9 .. .. .	30, 39
13 " " 19 .. .. .	29	28 " " 4, sec. 74 .. .. .	30
13 & 14 " " 3 .. .. .	12	30 " " 25 .. .. .	30, 295
1 William & Mary, cap. 2 .. .. .	24	32 " " 5, sec. 75 .. .. .	216
" " 5 .. .. .	64, 207	1 George III. cap. 6, sec. 71 .. .. .	244
" sess. 2, cap. 2 .. .. .	177	2 " " 4, sec. 72 .. .. .	244
" " " 41 .. .. .	24	5 " " 7, sec. 77 .. .. .	293
1 & 2 " " " 4 .. .. .	207	5 " " 38 .. .. .	291
2 " " " 2 .. .. .	43	10 " " 6, sec. 58 .. .. .	103
4 " cap. 13 .. .. .	183, 207	26 " " 10, sec. 80 .. .. .	293
4 " " sec. 22 .. .. .	257	26 " " 104, sec. 14 .. .. .	255
4 " " sec. 28 .. .. .	277	33 " " 9, sec. 55 .. .. .	37
6 & 7 " cap. 8, sec. 3 .. .. .	23	37 " " 33, sec. 80 .. .. .	243
7 " " 3 .. .. .	354	37 " " 70 .. .. .	310
8 & 9 " " 13, sec. 4 .. .. .	257	39 & 40 " " 27, sec. 12 .. .. .	142
13 & 14 " " 2, sec. 33 .. .. .	23	" " " 27, sec. 62 .. .. .	237
14 " " 2 .. .. .	23	41 " " 11, sec. 86 .. .. .	243
1 Anne, sess. 2, cap. 20 .. .. .	48, 183	41 " " 54, sec. 26 .. .. .	63
" " " sec. 52 .. .. .	242	42 " " 90 .. .. .	240
2 & 3 Anne, cap. 16 .. .. .	207	42 " " 90, sec. 2 .. .. .	63, 307
3 & 4 " " 5, sec. 52 .. .. .	244	42 " " 90, sec. 15 .. .. .	295
4 & 5 " " 22 .. .. .	24	42 " " 90, sec. 26 .. .. .	307
9 " " 9 .. .. .	24	42 " " 90, sec. 77 .. .. .	63
10 " " 33 .. .. .	207	42 " " 90, sec. 89 .. .. .	66
12 " " 13 .. .. .	24, 26	42 " " 90, sec. 103 .. .. .	67
12 " " 13, sec. 3 .. .. .	121	42 " " 90, sec. 111 .. .. .	56
1 George I. cap. 9 .. .. .	27	43 " " 20, sec. 4, 5, 9, 222, 223	223
" " 9, sec. 10 .. .. .	30	43 " " 140 .. .. .	143
" " 34 .. .. .	24, 27, 243	44 " " 54, sec. 21, 22, and 23 .. .. .	68
" " 34, sec. 40 .. .. .	30	44 " " 54, sec. 26 .. .. .	307
" sess. 2, cap. 3 .. .. .	27	45 " " 16, sec. 17 .. .. .	144
" " 34 .. .. .	58	47 " " 32, sec. 100 .. .. .	30
3 " cap. 2 .. .. .	24, 58	49 " " 12 .. .. .	144
4 " " 3, secs. 1-3 .. .. .	208	49 " " 12, sec. 96 .. .. .	237
4 " " 3, sec. 41 .. .. .	26	49 " " 12, sec. 118 .. .. .	243
4 " " 34, sec. 47 .. .. .	101	50 " " 71, sec. 31 .. .. .	38
13 " " 4 .. .. .	24	52 " " 22, sec. 23, 24 .. .. .	229
		52 " " 22, sec. 92 .. .. .	233
		53 " " 99 .. .. .	99
		53 " " 155, sec. 80 .. .. .	174
		54 " " 25 .. .. .	100
		54 " " 25, sec. 117 .. .. .	237

	Page		Page
55 George III. cap. 108, sec. 29 ..	103	17 & 18 Victoria, cap. 105, sec. 33 ..	67
55 " " 108, sec. 125 ..	271, 303	18 " " cap. 1, sec. 7 ..	307
55 " " 108 ..	67	19 & 20 " " 83 ..	46
56 " " 64, sec. 5 ..	67	20 & 21 " " 3 ..	171
57 " " 12, sec. 119, 120 ..	237	22 " " 66 ..	39, 102, 176
59 " " 9, sec. 139 ..	215	22 " " 4 ..	35
4 George IV. cap. 8, sec. 57 ..	176	22 & 23 " " 38, sec. 12 ..	67
4 " " 81, sec. 57, 58 ..	102	23 " " 9 ..	35
6 " " 50 ..	127	23 & 24 " " 94, sec. 14 ..	65
7 " " 64, sec. 20 ..	356	" " 94, sec. 15 ..	67
7 & 8 " " 12, sec. 11 ..	153	" " 123 ..	44, 129
7 & 8 " " 63 ..	223	24 & 25 " " 66 ..	143
10 " " 6, sec. 5 ..	103	" " 67 ..	39
11 " " 7 ..	143	" " 100 ..	221
11 " " 7, sec. 10 ..	183	" " 110, sec. 9 ..	190
11 " " 74, sec. 10 ..	218	25 & 26 " " 65 ..	221
5 & 6 William IV. cap. 76, sec. 51 ..	240	26 " " 8 ..	39
7 William IV. and 1 Victoria, cap. 90, sec. 5 ..	171	26 & 27 " " 48 ..	39
2 & 3 Victoria, cap. 47, sec. 64 ..	117	" " 57 ..	176, 204, 368
" " 59 ..	240	" " 65 ..	204
3 & 4 " " 57, sec. 2 ..	176	" " 65, sec. 5 ..	63, 307, 308
6 " " 3 ..	79	" " 65, sec. 23 ..	69
6 & 7 " " 85 ..	148, 353	28 " " 18, sec. 3, 7, 8 ..	149
7 " " 9 ..	79	28 & 29 " " 126, sec. 19 ..	171
7 " " 10, sec. 10 ..	218	29 & 30 " " 109, sec. 48 ..	44, 153
8 & 9 " " 113 ..	359	30 " " 109, sec. 88 ..	106
9 " " 11 ..	35	30 & 31 " " 35, sec. 2, 5 ..	156
9 " " 11, sec. 22 ..	233	" " 110, sec. 12 ..	70
10 " " 12 ..	35	31 " " 111, sec. 11 ..	71
11 & 12 " " 42, sec. 2 ..	190	31 & 32 " " 14, sec. 22 ..	34
14 & 15 " " 99 ..	148, 149, 205, 359	31 & 32 " " 76, sec. 7 and 12 ..	86
" " 100, sec. 4 ..	355-6	32 " " 13 ..	63, 64, 65
" " 100, sec. 24 ..	337	32 & 33 " " 68 ..	353
" " 100, sec. 9 ..	153	34 & 35 " " 86 ..	64
15 & 16 " " 50 ..	61	" " 86, sec. 6 ..	62
16 & 17 " " 83 ..	148	" " 86, sec. 8 ..	65
17 & 18 " " 104, sec. 260, 269 ..	199	" " 97, sec. 6 ..	137
" " 104, sec. 263 ..	138	35 " " 3, sec. 7 ..	103
		35 & 36 " " 64, sec. 13 ..	94
		36 & 37 " " 68, sec. 3 ..	65, 295

## LIST OF CASES REFERRED TO.

	Page		Page
Allan <i>ata.</i> Reg. .. ..	142	Bailey <i>v.</i> Macaulay .. ..	127
" " Re .. ..	225, 230	Baker <i>ata.</i> Reg. .. ..	171
André, Major .. ..	155	" " <i>v.</i> Handcock .. ..	117
Andrews <i>v.</i> Elliott .. ..	95, 161	Balaklava Charge .. ..	263
Archer <i>ata.</i> Rex .. ..	239	Bankers' Case .. ..	128
Armstrong's Case .. ..	126	Barker <i>ata.</i> Onnichund .. ..	353
Arthur <i>ata.</i> Bradley .. ..	146	Barrett <i>v.</i> Long .. ..	127
Austin <i>v.</i> Evans .. ..	148	Barwis <i>v.</i> Keppel .. ..	289
Aylbil <i>ata.</i> Rex .. ..	146	Bastard <i>ata.</i> Moore .. ..	143
		Basten <i>v.</i> Carew .. ..	115, 133
Bailey <i>ata.</i> Warden .. ..		Beatson <i>v.</i> Skene .. ..	147, 148, 199
73, 115, 119, 131, 143, 260, 262		Bell <i>ata.</i> Keighley .. ..	113, 115, 243, 258, 260

*List of Cases Referred to.*

xiii

	Page		Page
Bennett v. Case .. .. .	358	Dickson v. Wilton .. .. .	147, 199
Bentall v. Sydney .. .. .	148	Doe and Ashburnham v. Michael .. .. .	161
Bentinck ats. Home .. .. .	148, 197	Douglass v. Fellowes .. .. .	352
"    ats. Oliver .. .. .	172	Douglass's Case .. .. .	119, 233
Bentley's Case .. .. .	149	Drew ats. Phipps .. .. .	148
Birrell ats. Lee .. .. .	130	Duffield v. Smith .. .. .	15
Bilbie v. Lumley .. .. .	358		
Blaine ats. Hutton .. 135, 166, 168, 221		East India Co. ats. Gibson .. .. .	108
Blake, Re .. .. .	103, 119	Eden ats. Le Caux .. .. .	81
Boerkes Court Martial .. .. .	97	Edmonds ats. King .. .. .	127
Bonaeker v. Evans .. .. .	149	Elliott ats. Andrews .. .. .	95, 161
Bourne ats. Rex .. .. .	137, 164	Evan ats. Carmarthen .. .. .	128
Bowen ats. Rex .. .. .	239	Evans ats. Muirhead .. .. .	123
Bradley v. Arthur .. .. .	146	"    ats. Austin .. .. .	148
Brooks v. Graham .. .. .	58, 125, 131	"    ats. Bonaker .. .. .	149
"    v. Davis .. .. .	132	Eyre v. Palgrave .. .. .	148
Browne ats. King .. .. .	91		
Bullock v. Dadds .. .. .	171	Fellowes ats. Douglas .. .. .	351
Bunbury v. Fuller .. .. .	133	Fergusson v. Earl of Kinnoul .. .. .	75
Burwell ats. Broenvelt .. .. .	158	Fernandez, Ex parte .. 143, 159, 163	
Byng ats. Webb .. .. .	351	Ferrall ats. Reg. .. .. .	238
		Ferrand ats. Garnett .. .. .	136
Caine v. Coulton .. .. .	147	Fitzgerald's Case .. .. .	105
Camelford's Case .. .. .	180	Foskett .. .. .	79
Campbell v. The Queen .. .. .	154	Fox v. Wood .. .. .	135, 200
"    ats. Pyne .. .. .	851	Fray v. Ogle .. .. .	263
Carew ats. Baston .. .. .	115, 138	Freer v. Marshall .. .. .	260, 278
Carmarthen v. Evan .. .. .	128	Fuller ats. Bunbury .. .. .	133
Carter v. MacLaren .. .. .	358	Furly v. Newnham .. .. .	143
Castle Morton ats. Reg. .. .. .	351		
Cave v. Mountain .. .. .	115	Garnett v. Ferrand .. .. .	136
Cawthorne's Case .. .. .	113	Gaskin ats. Rex .. .. .	149
Clark's Case .. .. .	97	Gavin ats. Wotton .. .. .	112, 114, 233, 243, 260
Clements ats. King .. .. .	139	Gibson v. East India Co. .. .. .	108
Cobbett v. Hudson .. .. .	126	Ginger's Case .. .. .	289
"    v. Grey .. .. .	171	Gordon Riots .. .. .	187
Coffin v. Wilbur .. 129, 156, 162, 168		Gould ats. Grant .. .. .	57, 80, 81, 92, 94, 133, 148, 158, 178, 203, 260
Coffin's Case .. .. .	164	Graham ats. Brooks .. .. .	58, 125, 131
Coleridge ats. Cox .. .. .	137	Grant v. Gould .. .. .	57, 80, 81, 92, 94, 133, 148, 158, 178, 203, 260
Collier v. Hicks .. .. .	137	Grenville v. Coll. of Physicians .. .. .	117, 131, 135
Combermere ats. Dickson .. .. .	66	Grey ats. Cobbett .. .. .	171
Cooke ats. Reg. .. .. .	130	Groenvelt v. Burwell .. .. .	158
Coote ats. Reg. .. .. .	146	Guthrie ats. Reg. .. .. .	168
Cope, Sir John .. .. .	194		
Cotton ats. Langston .. .. .	143	Halcomb ats. Looker .. .. .	95
Coulton ats. Caine .. .. .	147	Handcock v. Baker .. .. .	117
Cox v. Coleridge .. .. .	137	Hannaford v. Hunn .. .. .	114
Crawley's Case .. .. .	103, 109	Harmony ats. Mitchell .. .. .	31
Cullen v. Morris .. .. .	103	Hartell ats. Rex .. .. .	166
		Heane ats. Reg. .. .. .	164, 243
Dadds ats. Bullock .. .. .	171	Henderson v. Broomhead .. .. .	353
Dale ats. King .. .. .	19, 33	Hicks ats. Collier .. .. .	137
Danvers ats. Jones .. .. .	113	Holloway v. The Queen .. .. .	164
Davis ats. Brooks .. .. .	132	Holt ats. Rex .. .. .	38
Dawkins v. Rokeby .. .. .	78, 79, 80, 81, 93, 119, 129, 145, 190, 243, 258, 260, 316	Home v. Bentinck .. .. .	148, 197
"    v. Rokeby (in error) .. .. .	192, 197		
"    v. Paulett .. .. .	80, 135, 199		
Dawson's Case .. .. .	150		
Derby's Trial, Lord .. .. .	150		
Dickson v. Combermere .. .. .	66, 199		



	Page		Page
Homes v. Sheridan .. ..	177	Mitchell v. Harmony .. ..	31
Hudson ats. Cobbett .. ..	126	Moore ats. Jekyll .. ..	135, 151
Huggins ats. Rex .. ..	141	"   v. Bastard .. ..	143
Hunn ats. Hannaford .. ..	114	Mordaunt, Re .. ..	194
Hunt ats. Johnson .. ..	95	Mott ats. Martin .. ..	66, 123, 132, 194
Hutton v. Blaine .. ..	135, 166, 168, 221	Mountain ats. Cave .. ..	115
Jamaica Court Martial .. ..	92	Muirhead v. Evans .. ..	123
Jekyll v. Moore .. ..	135, 151	Muroott ats. Rex .. ..	354
Jenkins ats. Reg. .. ..	380	Murray's Case .. ..	160
Jessop ats. Reg. .. ..	66	Nash v. The Queen .. ..	168
John ats. Wilson .. ..	135, 200	Nelson's Case .. ..	190
Johnson v. Hunt .. ..	95	Neabitt ats. Shoemakers .. ..	95, 133
Johnstone v. Sutton .. ..	74, 76, 80, 93, 115, 151	Neville ats. Kemp .. ..	115, 135, 158, 205
Jones v. Danvers .. ..	113	Newnham ats. Furlly .. ..	143
Keighley v. Bell .. ..	113, 115, 243, 258, 260, 364	Norris's Case .. ..	96
Kelly's Case .. ..	115	Ogle ats. Fray .. ..	263
Kemp v. Neville .. ..	115, 135, 158, 205	Oldroyd's Case .. ..	148
Kenworthy ats. Rex .. ..	157, 167	Oliver v. Bentinck .. ..	171
Keppel ats. Barwis .. ..	289	Omichund v. Barker .. ..	353
King * v. Edmonds .. ..	127	Orde's Case .. ..	118
"   ats. Reg. .. ..	148	Palgrave ats. Eyre .. ..	148
"   v. Dale .. ..	19, 33	Paulet ats. Dawkins .. ..	80, 135
"   v. Browne .. ..	91	Pearce ats. Rex .. ..	234
"   v. Tolguard .. ..	134	Philpots ats. Rex .. ..	164
"   v. Clements .. ..	139	Phipps v. Drew .. ..	148
Kinnoull, Earl of, ats. Fergusson ..	75	Physicians, Coll. of, ats. Grenville ..	117, 131, 135
Knox ats. Miller .. ..	135	Picton's Case .. ..	183
Lake's Case .. ..	148	Pinney ats. Rex .. ..	179
Langston v. Cotton .. ..	143	Poe's Case .. ..	96, 159
"   ats. Robeley .. ..	128	Prince Albert v. Strange .. ..	147
Le Caux v. Eden .. ..	81	Proctor v. Mainwaring .. ..	102
Le Roy, Tobias .. ..	97	Pryme v. Titchmarsh .. ..	128, 161
Lee v. Birrell .. ..	130	Pyne v. Campbell .. ..	351
Legatt v. Tollerrey .. ..	148	Reg.† v. Allen .. ..	142
Light's Case .. ..	117	"   v. Baker .. ..	171
Lloyd v. Woodhall .. ..	238	"   v. Castle Morton .. ..	351
Long ats. Barrett .. ..	127	"   ats. Campbell .. ..	154
Looker v. Halcomb .. ..	95	"   v. Cooke .. ..	130
Macaulay ats. Bailey .. ..	127	"   v. Coote .. ..	146, 354
Macey's Case .. ..	169	"   v. Ferrall .. ..	238
Mainwaring ats. Proctor .. ..	102	"   v. Guthrie .. ..	168
Mansergh's Case .. ..	160, 173, 227	"   v. Hale .. ..	350
Marshall ats. Freer .. ..	260, 278	"   v. Heane .. ..	164, 243
Martin v. Mott .. ..	66, 123, 132, 218	"   v. Holloway .. ..	164
"   ats. Mills .. ..	162	"   v. Jenkins .. ..	350
M'Call v. M'Dowell .. ..	114	"   v. Jessop .. ..	66
M'Cardle's Case .. ..	177	"   v. King .. ..	148
M'Dowell ats. M'Call .. ..	114	"   ats. Nash .. ..	168
Megara Court-martial .. ..	147	"   v. Shaw .. ..	354
Merrymau, Ex parte .. ..	114	"   v. Saddlers' Co. .. ..	149
Michael ats. Doe v. Ashburnham ..	161	"   v. Sturge .. ..	140
Miller v. Knox .. ..	135	"   v. Sullivan .. ..	127, 161
Milligan's Case .. ..	190	"   v. Sutton .. ..	128
Mills v. Martin .. ..	162	"   v. Thompson .. ..	354
		"   v. Vaughan .. ..	190

\* See also "Rex."

† See title "King."

# Dates of Articles of War.

xv

	Page		Page
Reg. v. Winsor .. .. .	141, 220	Stale ats. Reg. .. .. .	350
Revis v. Smith .. .. .	353	Stansfeld ats. Scott .. .. .	135
* Rex v. Archer .. .. .	239	Stirling's Case .. .. .	103
" v. Aylbil .. .. .	144	Storey, Ex parte .. .. .	159
" v. Barton .. .. .	357	Strange ats. Prince Albert .. .. .	147
" v. Bowen .. .. .	239	Studwick ats. Rickman .. .. .	238
" v. Bourne .. .. .	157, 164	Sturge ats. Reg. .. .. .	140
" v. Edmonds .. .. .	127	Suddis ats. Rex .. .. .	30, 88, 99, 135, 154, 150, 221, 291
" v. Ellis .. .. .	167	Sullivan ats. Reg. .. .. .	127, 161
" v. Gaskin .. .. .	149	Sutton ats. Johnstone .. .. .	74, 76, 80, 93, 115, 151
" v. Hartel .. .. .	166	" ats. Reg. .. .. .	128
" v. Holt .. .. .	38	Sydney ats. Beutall .. .. .	148
" v. Huggins .. .. .	141	Taylor ats. Vansittart .. .. .	95
" v. Kenworthy .. .. .	157, 167	" ats. Rex .. .. .	220
" v. Muroot .. .. .	354	Thompson ats. Reg. .. .. .	354
" v. Pearce .. .. .	234	Timms v. Williams .. .. .	79
" v. Philpots .. .. .	164	Timothy v. Simpson .. .. .	111
" v. Pinney .. .. .	179	Titchmarsh ats. Pryme .. .. .	128, 161
" v. Suddis .. .. .	30, 88, 99, 135, 154, 159, 221, 291	Tobin v. The Queen .. .. .	364
" v. Taylor .. .. .	220	Tollerrey ats. Legatt .. .. .	148
" v. Thompson .. .. .	354	Tone, Wolfe .. .. .	118
" v. Woodfall .. .. .	357	" Twee Gebroeders" .. .. .	104
Rickman v. Studwick .. .. .	238	Vanderheyden v. Young .. .. .	74, 95
Robeley v. Langston .. .. .	128	Vansittart v. Taylor .. .. .	95
Rokeyb ats. Dawkins .. .. .	78, 79, 80, 81, 93, 119, 129, 145, 192, 199, 243, 258, 260, 316	Vaughan ats. Reg. .. .. .	190
Ross's Case .. .. .	192	Wall's Case .. .. .	180, 183
Rush's Case .. .. .	139	Warden v. Bailey .. .. .	73, 115, 119, 131, 260, 262, 236, 238
Sackville's Case .. .. .	96	Webb v. Byng .. .. .	352
Saddlers' Co. ats. Reg. .. .. .	149	Wilbur ats. Coffin .. .. .	129, 156, 162, 168
Scott v. Stansfeld .. .. .	135	Williams ats. Timms .. .. .	79
Sellard v. Zomes .. .. .	177	Wilson v. John .. .. .	135, 200
Shaw ats. Reg. .. .. .	354	Wilton ats. Dickson .. .. .	147
" ats. Smith .. .. .	97, 114, 115, 132	Winsor v. Reg. .. .. .	141, 220
Sheridan ats. Holmes .. .. .	177	Wise v. Withers .. .. .	132
Shoemaker v. Nesbit .. .. .	95, 133	Withers ats. Wise .. .. .	132
Simpson ats. Timothy .. .. .	111	Wolfe Tone's Case .. .. .	118, 190
Skene ats. Beatson .. .. .	147, 148, 199	Wood ats. Fox .. .. .	135, 200
Smales' Case .. .. .	109	Woodhall ats. Lloyd .. .. .	238
Smith ats. Duffield .. .. .	95	Wotton v. Gavin .. .. .	112, 114, 233, 243, 260
" v. Shaw .. .. .	97, 114, 115, 132	Young ats. Vanderheyden .. .. .	74, 95
Solguard ats. King .. .. .	134	Zomes ats. Sellard .. .. .	177
Somerville .. .. .	109		

\* See title "King."

## DATES OF ARTICLES OF WAR WITH THE PAGES WHERE THEY ARE REFERRED TO.

Year	Page	Year	Page
1629 .. .. .	9, 157, 270	1662-3 .. .. .	13, 116
1638 .. .. .	8	1666 { 13, 16, 18, 52, 111, 116, 138, 143	
1639 .. .. .	4, 10, 11, 36, 125	1672 { 13, 15, 18, 54, 52, 59, 111, 114,	
1640 .. .. .	4, 40	116, 125, 129, 143, 151, 157,	
1642 .. .. .	10, 11, 13, 15, 40, 84	203	

xvi *Dates of Royal Commissions and Warrants.*

Year	Page	Year	Page
1685 .. .. .	279	1828 .. .. . 34, 94, 122,	267
1686 .. .. . 18, 34, 53, 84,	203	1829 .. .. . 35, 122, 124, 153,	290, 299
1690 .. .. .	90	1830 .. .. . 35, 155, 201, 202,	301
1715 .. .. .	23	1831 .. .. .	310
1717 { 23, 34, 98, 110, 111, 113, 114,		1833 .. .. .	267
116, 121, 129, 138, 143, 151,		1836 .. .. .	268
155, 203, 255, 256, 257, 258,		1838 .. .. .	268
259, 260, 263, 264, 265, 267,		1840 .. .. .	202
268, 269, 270, 271, 272, 274,		1841 .. .. .	176
276, 277, 278, 279, 289, 291,		1842 .. .. .	270
295, 296		1844 .. .. . 35, 259, 260, 283, 291,	296
1722 .. .. .	259	1845 .. .. .	268
1731 Navy Regulations .. ..	42	1847 .. 35, 125, 202, 263, 265, 288,	289
1742 { 34, 100, 114, 122, 259, 285, 295,		1849 .. .. . 274, 275, 287, 288	
296		1850 .. .. .	268, 274
1744 .. .. .	94	1854 .. .. .	125, 300
1748 { 34, 114, 138, 144, 256, 258, 259,		1855 .. .. . 114, 260, 274, 285	
260, 261, 262, 263, 264, 267,		1856 .. .. .	291, 292
268, 269, 271, 272, 276, 277,		1857 .. .. .	202, 286, 302
279, 280, 289, 294, 295, 296,		1858 .. .. .	202, 302
298		1859 .. .. .	35
1749 .. .. .	94, 222, 267	1860 { 35, 100, 125, 202, 263, 265, 267,	
1750 .. .. .	99	284, 287, 288, 289, 297, 304,	
1751 .. .. .	267	305, 308	
1755 .. .. .	35, 306	1861 .. .. .	293
1775 (Massachusetts Articles)	40	1862 .. .. . 100, 275, 279, 286, 308	
1784 .. .. .	34, 99, 305	1863 .. .. . 261, 264, 266, 298, 308	
1785 .. .. .	35, 306	1865 .. .. .	114, 285, 307
1788 .. .. .	7	1866 .. .. . 115, 153, 268, 280, 286, 297	
1794 .. .. .	34	1867 .. .. . 259, 265, 284, 289, 305	
1795 .. .. .	35, 105	1868 .. .. . 263, 264, 281, 284, 298	
1798 .. .. .	306	1869 { 15, 39, 202, 275, 286, 287, 298,	
1800 .. .. .	99	308, 316	
1803 .. .. .	295	1870 .. .. . 106, 273, 280, 281, 282, 304	
1804 .. .. .	215	1871 .. .. . 265, 286, 304	
1805 .. .. .	144	1872 { 55, 111, 113, 125, 136, 138, 154,	
1815 .. .. .	262	155, 170, 173, 203, 259, 298,	
1816 .. .. .	262	307	
1817 .. .. .	260, 294	1873 { .. 124, 127, 202, 249, 282,	
1819 .. .. .	298	296	

DATES OF ROYAL COMMISSIONS AND WARRANTS  
RELATING TO THE DISCIPLINE OF THE ARMY.

	Page		Page
Commission of 1625 .. .. .	4	Royal Warrant of 26th February	
" 1638 .. .. .	4, 10	1693-4 .. .. .	90
Proclamation of 1672 .. .. .	17	" 18th February 1694-5	
Royal Warrant of 29th April			194
1689 .. .. .	89	" 18th April 1695 .. .. .	97
" 15th July 1690 .. .. .	90	" 9th February 1696-7	89
" 21st July 1690 .. .. .	89	" August 1746	194
" 22nd August 1690 .. .. .	89	" 1757	194

# CONTENTS.

## CHAPTER I.

### INTRODUCTION.—THE MILITARY CODE PRIOR TO THE MUTINY ACT.

Par.	Page	Par.	Page
1. The subject stated .. .. .	1	20. The Provost-Marshal and the Devil's Article .. .. .	11
2. Peculiar difficulties incident thereto .. .. .	2	21. Military Law in Charles II.'s reign: Militia not subjected thereto. Militia oath .. .. .	12
3. The authorities for Constitutional Law—patent .. .. .	<i>ib.</i>	22. "Guards and Garrisons" of the King. Code of 1662-3 .. .. .	<i>ib.</i>
4. Not so the authorities for Military Law .. .. .	<i>ib.</i>	23. The Codes of 1666 and of 1672 .. .. .	13
5. The Military Code of 1872 consistent with earlier Codes .. .. .	3	24. Contents of the Code of 1666 .. .. .	<i>ib.</i>
6. Authenticity of the early Military Codes examined .. .. .	<i>ib.</i>	25. The Administration of Justice: (1) General; (2) Regimental; and (3) Detachment or Garrison Courts .. .. .	14
7. Prior inquiry as to Martial Law; two illustrations of Martial Law .. .. .	4	26. Civil Magistrate's Jurisdiction not interfered with .. .. .	<i>ib.</i>
8. The Commission of 1625 .. .. .	<i>ib.</i>	27. The origin of the Code of 1672 .. .. .	15
9. The Petition of Right against such Commissions .. .. .	5	28. The General Contents .. .. .	<i>ib.</i>
10. The Commission of 1638 .. .. .	6	29. Oath of the Soldiers against treason, &c. .. .. .	<i>ib.</i>
11. Gave authority for (1) Martial Law, and (2) Military Law .. .. .	7	30. Punishment for Sedition and other offences .. .. .	16
12. Declared illegal by the Judges in 1640 .. .. .	<i>ib.</i>	31. Administration of Justice: General Court-martial .. .. .	<i>ib.</i>
13. No subsequent Commissions of Martial Law .. .. .	8	32. The same: Regimental Courts .. .. .	<i>ib.</i>
14. Inquiry respecting Military Law under the Stuarts .. .. .	<i>ib.</i>	33. The Provost-Marshal .. .. .	17
15. The Code of 1629—offences and punishments .. .. .	9	34. Redress of wrongs of Inferiors against Superiors .. .. .	<i>ib.</i>
16. Administration of Justice thereunder .. .. .	<i>ib.</i>	35. Proclamation of December 1672 .. .. .	<i>ib.</i>
17. The Codes of 1639 and of 1642—their contents .. .. .	10	36. Punishments of the Codes of 1666 and 1672 contrasted .. .. .	18
18. Political character of the King's Service .. .. .	<i>ib.</i>	37. The Code of James II. (1686): Contents .. .. .	<i>ib.</i>
19. The Administration of Justice under that of 1639 .. .. .	11	38. Code applicable to "Rebels" as well as to Enemies .. .. .	19
		39. The necessity for the Mutiny Act of 1689 .. .. .	<i>ib.</i>

## CHAPTER II.

### THE MILITARY CODE AFTER THE MUTINY ACT.

1. The occasion of the Enactment .. .. .	20	6. Miscellaneous provisions afterwards added .. .. .	22
2. Preamble .. .. .	<i>ib.</i>	7. The Act during William III.'s reign, and Duke of Marlborough's commission as Commander-in-Chief .. .. .	23
3. Courts-martial authorized .. .. .	21		
4. Militia exempted from the Act .. .. .	22		
5. Operation limited to England .. .. .	<i>ib.</i>		

CHAPTER II.—*continued.*

Par.	Page	Par.	Page
8. The same, Mutiny Act, Anne's reign. 1st. Alterations in the Preamble: As to purposes of the Army .. .. .	23	to persons not originally liable thereto .. .. .	31
9. As to numbers of the Army .. .. .	24	25. No classification of Crime in the Mutiny Act, 1715 .. .. .	32
10. 2nd: As to power to declare Martial Law .. .. .	25	26. Capital Punishment not always inflicted .. .. .	<i>ib.</i>
11. Same: Government of the Army abroad .. .. .	<i>ib.</i>	27. Corporal substituted for Capital Punishment .. .. .	<i>ib.</i>
12. Same: Articles of War relating thereto .. .. .	<i>ib.</i>	28. Transportation for Desertion .. .. .	33
13. As to the tenth Mutiny Act (1712) of Anne's reign: Its general character .. .. .	26	29. Corporal Punishment mitigated and abolished .. .. .	<i>ib.</i>
14. Same: Government of the Army abroad, and power granted to the Crown to make Articles of War .. .. .	<i>ib.</i>	30. The Military Codes of 1717 and 1872 compared .. .. .	<i>ib.</i>
15. The second Mutiny Act of first year of Geo. I.'s reign (1715) .. .. .	27	31. Changes in Military Code and in Mutiny Act from 1717 to 1828 .. .. .	34
16. The third of the same: harsh nature of its provisions .. .. .	<i>ib.</i>	32. In Articles of War, 1717 to 1748 .. .. .	<i>ib.</i>
17. Review of the Military Code after the Rebellion .. .. .	28	33. In same, 1748 to 1828 .. .. .	<i>ib.</i>
18. Opposition to a Standing Army .. .. .	<i>ib.</i>	34. In same and Act, in 1829 .. .. .	35
19. Preliminary questions to the consideration of a Statutory Military Code: (1) Localization of Regiments; (2) Government by Civil Magistrate; (3) A Permanent Code by Statute .. .. .	<i>ib.</i>	35. " " in 1847 .. .. .	<i>ib.</i>
20. Objections stated .. .. .	29	36. " " in 1860 .. .. .	<i>ib.</i>
21. Power to make, to declare offences, and punishment, by the Articles of War .. .. .	<i>ib.</i>	37. Military Code printed with notes in the Appendix .. .. .	<i>ib.</i>
22. Obedience to any Military Order in 1715 .. .. .	30	38. One characteristic—as to Public Worship—in all Codes .. .. .	36
23. The Code amended in 1718 and 1749 .. .. .	31	39. As to short duration of the Mutiny Act .. .. .	<i>ib.</i>
24. Extension of the Mutiny Act		40. No foreign controversial subject to be introduced .. .. .	37
		41. Bill originates in the Commons.—As to Articles of War .. .. .	<i>ib.</i>
		42. Military Code as applicable to (1) Marines; (2) Indian, and (3) American, Armies .. .. .	38
		43. I. As to Royal Marine Regiments .. .. .	<i>ib.</i>
		44. Law applicable thereto .. .. .	<i>ib.</i>
		45. II. As to the Indian European Army .. .. .	39
		46. III. As to the American Code .. .. .	<i>ib.</i>
		47. American authorities cited .. .. .	40

## CHAPTER III.

## THE NAVAL CODE, GOVERNMENT, AND PROCEDURE.

1. Jurisdiction of the Lord High Admiral .. .. .	41	8. Jurisdiction as to persons .. .. .	45
2. York's Ordinances, and 13 Car. II. c. 9 .. .. .	42	9. ————— the same .. .. .	46
3. Lords Commissioners of the Admiralty .. .. .	<i>ib.</i>	10. ————— as to offences .. .. .	<i>ib.</i>
4. Government of the Navy .. .. .	43	11. ————— as to locality .. .. .	47
5. Naval discipline Code .. .. .	44	12. Sittings of the Court .. .. .	<i>ib.</i>
6. Courts-martial thereunder .. .. .	<i>ib.</i>	13. Regulation of procedure .. .. .	<i>ib.</i>
7. Where to be held .. .. .	45	14. Immediate execution of the sentence .. .. .	48
		15. Revision by the Admiralty .. .. .	<i>ib.</i>

# CHAPTER IV.

## MILITARY GOVERNMENT.

Par.	Page	Par.	Page
1. Some knowledge of Military organization essential .. ..	49	13. Government of the Army after the Revolution of 1688 .. ..	54
2. As to Military Government from 1660 to 1872 .. ..	ib.	14. Changes in Military organisation in 1792 .. ..	55
3. As to "Garrisons" .. ..	50	15. Military "Districts" and "Generals," superseded "Garrisons," and "Governors" .. ..	56
4. Authority of the Governor supreme .. ..	ib.	16. Regimental Command and Chain of Responsibility .. ..	ib.
5. As to the "Guards" .. ..	51	17. Separate Courts for the enforcement of Discipline .. ..	57
6. Supreme personal command of the King .. ..	52	18. Analogy to Civil Courts .. ..	ib.
7. Augmentations and Articles of War in 1666 and 1672 .. ..	ib.	19. Summoned by each Military Hierarchy .. ..	58
8. Altered Military organization .. ..	ib.	20. The General Court .. ..	ib.
9. James II. and Monmouth's Rebellion .. ..	53	21. The District Court .. ..	ib.
10. Constitutional aspect of the Army in reigns of Charles II. and James II. .. ..	ib.	22. The Regimental Court .. ..	59
11. The Constitutional aspect of the Army in William III.'s reign .. ..	54	23. The exceptional Courts—as General Detachment and Drum Head .. ..	ib.
12. The Military Code increased in severity of punishment .. ..	ib.	24. The three Courts—General, District, and Regimental—administer Military Law .. ..	60

# CHAPTER V.

## THE GOVERNMENT OF THE MILITIA AND AUXILIARY FORCES.

1. The Militia Establishment from 1661 to 1871 .. ..	61	16. I. Militia, (4) Volunteers training with Line Regiments .. ..	67
2. The three fundamental principles affecting the Auxiliary Forces .. ..	ib.	17. ————— (5) Permanent Staff .. ..	ib.
3. Constitutional changes of 1871 .. ..	62	18. II. Yeomanry, (a) command .. ..	ib.
4. (a) As to command .. ..	ib.	19. ————— (1) (b) Courts-martial Jurisdiction .. ..	68
5. Attaching to Regiments of the Army .. ..	63	20. ————— (2) Do. .. ..	ib.
6. Relative rank .. ..	ib.	21. ————— (3) Permanent Staff .. ..	ib.
7. (b) As to Court-martial Jurisdiction .. ..	64	22. III. Volunteers, (a) command .. ..	ib.
8. Changes to be traced in each force .. ..	ib.	23. ————— (b) Courts-martial Jurisdiction, (1) on service .. ..	69
9. I. Militia, (a) command .. ..	ib.	24. ————— (2) Permanent Staff .. ..	ib.
10. ————— (b) Courts-martial Jurisdiction (1) during preliminary training .. ..	65	25. ————— (3) training and exercise .. ..	ib.
11. ————— the place and time of training .. ..	ib.	26. IV. Reserve Forces, (a) command .. ..	ib.
12. ————— with Line Recruits in Militia Act 1873 .. ..	ib.	27. Do. .. .. do. .. ..	ib.
13. ————— (2) ordinary training .. ..	66	28. ————— (b) Court-martial Jurisdiction .. ..	70
14. ————— (3) embodiment .. ..	ib.	29. V. Militia Reserve, (a) command (b) Court-martial Jurisdiction .. ..	ib.
15. ————— result of 1, 2, and 3 .. ..	66	30. Authority to be exercised with extreme care .. ..	71

## CHAPTER VI.

## MILITARY OBLIGATIONS.

Par.	Page	Par.	Page
1. Articles of War put forth as "Orders" .. .. .	72	11. The necessity of it enforced by the Duke of Wellington ..	77
2. Officer's and Soldier's contract—what? .. .. .	<i>ib.</i>	12. Obedience to Military Tribunals absolute .. .. .	78
3. Powers of the Crown under contract .. .. .	73	13. Redress of grievances in 1717 .. .. .	<i>ib.</i>
4. The Conditions of Military Service .. .. .	<i>ib.</i>	14. Same as to Soldiers .. .. .	<i>ib.</i>
5. Implicit obedience .. .. .	<i>ib.</i>	15. Same in 1872 as to Officers ..	79
6. Law may be classified as (I.) <i>Lex scripta</i> .. .. .	74	16. Military Tribunals are for the safety of the State .. .. .	<i>ib.</i>
7. The object being to train to and maintain discipline ..	<i>ib.</i>	17. The State delegates judicial powers to the Officers .. ..	80
8. Not in Peace only, but essentially in War .. .. .	75	18. The Common Law Courts uphold these Tribunals .. .. .	81
9. II. As to <i>Lex non scripta</i> , and obedience thereto .. .. .	76	19. As shown hereafter, no Officer has a right to be arrested or tried .. .. .	<i>ib.</i>
10. Sir Robert Peel's statement of this rule .. .. .	<i>ib.</i>		

## CHAPTER VII.

## MILITARY PROCEDURE AND JURISDICTION.

1. Court of the Constable and Marshal .. .. .	83	19. Nor in the same for minor offences .. .. .	90
2. Ancient Jurisdiction .. .. .	<i>ib.</i>	20. Practical effect was to give legal sanction to Capital and Corporal Punishment .. ..	<i>ib.</i>
3. Constitutional objections to the Military Code .. .. .	<i>ib.</i>	21. The proceedings of Courts-martial need confirmation ..	91
4. Method of Military Justice in the Army of France in 1672 ..	84	22. Political offences triable under the Code .. .. .	<i>ib.</i>
5. The same: Provost-Marshal ..	<i>ib.</i>	23. Trials for Sedition .. .. .	92
6. The same: Councils or Courts of War .. .. .	85	24. Superior Officer convenes Courts-martial .. .. .	<i>ib.</i>
7. The same: Criminal causes and execution of Sentence .. ..	<i>ib.</i>	25. Exception to this rule .. ..	93
8. The same: Discipline of Regiments .. .. .	86	26. Who liable to the Code and for what offences .. .. .	<i>ib.</i>
9. As to Court-martial procedure ..	<i>ib.</i>	27. Who are liable to these Tribunals .. .. .	<i>ib.</i>
10. Constitution of the court .. ..	87	28. By Statute and appointment of the Crown .. .. .	94
11. Method of procedure .. .. .	<i>ib.</i>	29. Lord Campbell's definition ..	<i>ib.</i>
12. Execution of sentence .. .. .	<i>ib.</i>	30. Liability by Statute .. .. .	95
13. The Court-martial proceedings of 1686-8 .. .. .	<i>ib.</i>	31. Must exist at the time of the offence and arrest .. ..	<i>ib.</i>
14. Establishment of a General Court-martial .. .. .	88	32. As to liability of an Officer on leave .. .. .	<i>ib.</i>
15. For Military Discipline .. .. .	<i>ib.</i>	33. Same: after dismissal .. ..	96
16. Same: for Offences against Civilians .. .. .	<i>ib.</i>	34. Same: Foreign Troops .. ..	<i>ib.</i>
17. Sittings of this Court until April 1688 .. .. .	89	35. „ Alien Spies .. .. .	97
18. No change of procedure traceable in the Court-martial Records after the Mutiny Act, nor in Court-martial Warrants for Capital Crimes ..	<i>ib.</i>	36. As to liability to civil courts ..	<i>ib.</i>
		37. (a) The Criminal Law superseded by the Code of 1717 ..	98
		38. The Code amended .. .. .	<i>ib.</i>

CHAPTER VII.—continued.

Par.	Page	Par.	Page
39. Exception in places abroad having no Civil Judicature..	98	46. Military Crime, not Local ..	103
40. Military Tribunals in the Field	99	47. Military Crime in a Foreign Country .. .. .	104
41. Exception for petty pilferings from comrades .. ..	100	48. No Military Court-martial on board H.M.'s Ships .. ..	ib.
42. (b) Recovery of Debts. Arrest	ib.	49. Article of War in 1795, and Commander-in-Chief's Regulations to that effect .. ..	105
43. Law amended in 1718 .. ..	101	50. Court-martial on board Ship in 1800 .. .. .	ib.
44. Exception for recovery of debts in India .. .. .	ib.	51. Navy Discipline Act, 1866 ..	106
45. Offence must be within the period of limit and uncondoned	102		

CHAPTER VIII.

THE INITIATION OF LEGAL PROCEEDINGS BY THE ARREST OF THE OFFENDER.

1. Object of the Chapter .. ..	107	13. Notice of Arrest to be given to Commanding Officer within twenty-four hours .. ..	114
2. The Unity of Military Command in the Commander-in-Chief	ib.	14. Duration of Arrest .. ..	ib.
3. His disciplinary Officer—the Adjutant-General .. ..	108	15. Responsibility of it .. ..	115
4. His Consultative, or Legal Adviser—the Judge Advocate General .. .. .	ib.	16. Investigation of the charge against the Prisoner .. ..	ib.
5. As to initiation of proceedings	109	17. Formerly taken by Judge Advocate General and his office as Public Prosecutor .. ..	116
6. The Military Agent in the Arrest .. .. .	111	18. Imprisonment and Arrest under the control of the Prisoner's Commanding Officer .. ..	ib.
7. Authority of all Officers to arrest in frays .. ..	ib.	19. Power to confine to Barracks .. .. .	ib.
8. Arrest of (1) Deserters with assent of Justices; and (2) of Military offenders on board Ships of War .. ..	112	20. Custom of the Service stated ..	117
9. No Parliamentary privilege to exempt .. .. .	ib.	21. Courts-martial for oppression	118
10. Arrest open or close .. ..	113	22. The Legal Remedy for Illegal Arrest .. .. .	ib.
11. Deemed lawful custody .. ..	ib.	23. Remedy against oppression ..	119
12. Obligatory on Guard to hold the Prisoner .. .. .	ib.	24. Common Law Courts reluctant to interfere .. .. .	ib.

CHAPTER IX.

THE ARRAIGNMENT, TRIAL, AND SENTENCE OF THE PRISONER.

1. Analogy between Military and Civil Tribunals .. ..	120	9. Supernumerary Officers acting as Members .. .. .	123
2. Military Courts enjoy the confidence of the Army .. ..	ib.	10. Procedure of these Courts ..	ib.
3. Military Code of 1872 .. ..	121	11. Of the President .. ..	124
4. Regimental Court .. ..	ib.	12. To be strictly impartial .. ..	ib.
5. Discretion in the General of the District as to the Court	ib.	13. The Judge Advocate at the General Court .. ..	125
6. Discretion in the Committing Officer .. .. .	122	14. The office of Prosecutor .. ..	126
7. District or General Court summoned .. .. .	ib.	15. Challenge of the Judges ..	ib.
8. Quorum and decision of the Convening Officer thereon ..	123	16. Causes of Challenge .. ..	127
		17. Oaths of the Judges—standard of Justice .. .. .	128
		18. Usage or custom .. ..	ib.
		19. Substance of it .. .. .	129



## CHAPTER IX.—continued.

Par.	Page	Par.	Page
20. Mr. Justice Willes' remarks on it .. .. .	129	51. Power to punish for Perjury ..	144
21. Sir Charles Napier's .. .. .	<i>ib.</i>	52. Evidence given <i>vidæ vocæ</i> ..	<i>ib.</i>
22. The Oath of Secrecy .. .. .	130	53. As to the Rules of Evidence ..	145
23. Sanctioned by Parliament .. ..	<i>ib.</i>	54. The same .. .. .	<i>ib.</i>
24. President to examine legality of proceedings (a, b, c, and d) ..	131	55. Evidence of Officers on professional competency .. .. .	146
25. As to the authority of the Convening Officer (a) .. .. .	<i>ib.</i>	56. Privileged Communications and Official Documents .. .. .	147
26. As to the qualification of the Members (b) .. .. .	<i>ib.</i>	57. Statutory amendments therein ..	148
27. The same .. .. .	132	58. Defendant to be heard in his defence .. .. .	149
28. In doubt, to take the directions of the Secretary of State ..	<i>ib.</i>	59. Limits of his examination and address .. .. .	<i>ib.</i>
29. As to status of the Prisoner (c) ..	133	60. Voting of the Court .. .. .	150
30. As to the Offence (d) .. .. .	<i>ib.</i>	61. The whole circumstances and persons before the Court for notice .. .. .	151
31. The Prisoner may move for a Prohibition .. .. .	134	62. As to "honourable" acquittal ..	<i>ib.</i>
32. Questions to be decided thereon ..	<i>ib.</i>	63. First, the finding as a Jury ..	152
33. If properly constituted, the Members exempt from personal liability .. .. .	<i>ib.</i>	64. Substitution of a lesser for a greater offence .. .. .	153
34. Their powers as Judges .. .. .	135	65. Second, as to their Sentence: Evidence as to Character .. ..	<i>ib.</i>
35. Postponement of a Trial .. .. .	136	66. Discretion of the Court .. .. .	154
36. Exclusion of Barristers and Attorneys .. .. .	<i>ib.</i>	67. As to votes of those who declare the Prisoner innocent .. .. .	<i>ib.</i>
37. Analogy at Common Law .. .. .	137	68. As to punishments .. .. .	<i>ib.</i>
38. Reasons of the Rule .. .. .	138	69. As to sentence of Death .. .. .	155
39. Proceedings to be protected from interruption .. .. .	<i>ib.</i>	70. Punishments contrasted in 1717 and 1872 .. .. .	<i>ib.</i>
40. Publication may be restrained ..	139	71. No power to award Costs .. ..	156
41. Prisoner always to be present ..	<i>ib.</i>	72. Sentence signed by the President .. .. .	<i>ib.</i>
42. Charges to be explicit .. .. .	<i>ib.</i>	73. Distinction between Finding of Court-martial and Verdict of a Jury .. .. .	<i>ib.</i>
43. Evidence afterwards to be recorded though "Guilty" be pleaded .. .. .	140	74. Proceedings to be sent to Convening Officer for confirmation or revision .. .. .	157
44. "Not Guilty," defence thereunder .. .. .	<i>ib.</i>	75. Revision by the Court .. .. .	<i>ib.</i>
45. The case of Second Trial pleaded .. .. .	<i>ib.</i>	76. Application to Common Law Tribunals at instance of the accused (1) for Prohibition ..	158
46. Power to dissolve Court, or enter <i>Nolle prosequi</i> .. .. .	142	77. (2) for <i>Habeas Corpus</i> .. .. .	159
47. Power to compel the attendance of Witnesses .. .. .	<i>ib.</i>	78. (3) for <i>Certiorari</i> .. .. .	160
48. As to those in Custody .. .. .	<i>ib.</i>	79. As to the rule "Consensus tollit errorem" as applicable to Court-martial practice .. .. .	<i>ib.</i>
49. Power to commit if standing mute .. .. .	143		
50. " " swear Witnesses .. .. .	<i>ib.</i>		

## CHAPTER X.

## THE CONFIRMATION AND EXECUTION OF A COURT-MARTIAL SENTENCE.

1. Responsibility of Confirming Authority .. .. .	162	5. Duty of the Confirming Authority .. .. .	164
2. No other appeal from error .. ..	<i>ib.</i>	6. Original intention of this office .. .. .	165
3. By whom this duty is to be discharged .. .. .	163	7. I. As to the Jurisdiction of the Court .. .. .	<i>ib.</i>
4. Aid of the Judges or Law Officers in doubtful cases .. .. .	<i>ib.</i>	8. II. As to the Trial and Finding ..	166

## CHAPTER X.—continued.

Par.	Page	Par.	Page
9. No recommendation should be embodied in the Finding ..	166	Labour, Solitary Confinement, or Penal Servitude ..	171
10. III. As to the Sentence and Punishment .. .. .	<i>ib.</i>	21. Remarks of the Court on those (other than the Prisoner) who have come before them ..	172
11. As to revision of errors ..	167	22. Power of Confirming Officer to censure the Court .. ..	<i>ib.</i>
12. Confirmation of the Sentence ..	168	23. Responsibility for Discipline with the General Officer ..	<i>ib.</i>
13. As to the Sentence, one of three courses may be taken .. .. .	<i>ib.</i>	24. The ultimate custodian of these records .. .. .	173
14. Court-martial Sentence works no legal forfeiture of Civil rights .. .. .	<i>ib.</i>	25. As to Production .. .. .	<i>ib.</i>
15. I. As to Pardon of a Military offender .. .. .	169	26. As to the Army in India ..	<i>ib.</i>
16. II. As to mitigation of Sentence by Statute .. .. .	<i>ib.</i>	27. Powers of the Crown there ..	174
17. As to exercise of this Power ..	170	28. Contrasts of Court-martial Warrants to General Officers ..	<i>ib.</i>
18. III. As to Execution of the Sentence .. .. .	<i>ib.</i>	29. Variations in same .. ..	175
19. Same must be strictly followed ..	171	30. As to native troops .. ..	<i>ib.</i>
20. As to Imprisonment,—Hard		31. As to discipline of the Army there .. .. .	176
		32. Other statutory provisions ..	<i>ib.</i>

## CHAPTER XI.

## MARTIAL LAW.

1. As restrained by the Statute Law .. .. .	177	14. II. Does not make the Military Code applicable to Civilians ..	183
2. As to the power of the Crown to issue .. .. .	178	15. „ The Proclamation should regulate its use .. .. .	184
3. Distinction between Martial and Military Law .. .. .	<i>ib.</i>	16. „ Applied to a (a) Conquered Country; or (b) in Rebellion .. .. .	186
4. Military Officer should not initiate Martial Law .. ..	179	17. „ As to (b) Rebellion .. ..	<i>ib.</i>
5. Martial Law—the law of necessity .. .. .	<i>ib.</i>	18. „ As to the Proclamation and its effect .. .. .	187
6. Martial Law against (1) Officers and Soldiers; (2) Civilians .. .. .	<i>ib.</i>	19. „ Trial of Prisoners if Civil Courts be open .. .. .	188
7. I. Summary power for Military Offences .. .. .	180	20. „ Trial of Prisoners by Court-martial under Martial Law ..	<i>ib.</i>
8. „ „ „ „ Civil Offences .. .. .	<i>ib.</i>	21. As to Crimes and Punishments .. .. .	<i>ib.</i>
9. Views of the Cabinet in 1809 ..	181	22. Local Jurisdiction to be observed .. .. .	189
10. Martial Law by the Provost Marshal in the Peninsular War .. .. .	<i>ib.</i>	23. Proclamation not to have a retrospective operation ..	<i>ib.</i>
11. Military Code amended in 1813 ..	182	24. Protection against abuse of power— <i>Habeas Corpus</i> ..	<i>ib.</i>
12. Military Code amended in 1829 ..	<i>ib.</i>	25. Civil and Criminal proceedings against the Officer .. ..	190
13. II. What circumstances justify its use .. .. .	183	26. What is the Officer's defence? ..	<i>ib.</i>

## CHAPTER XII.

## COURTS OF INQUIRY.

1. Divided as (I.) under Prerogative; (II.) under Statute ..	192	3. I. Court of Inquiry in 1708 ..	193
2. I. As to those under Prerogative .. .. .	<i>ib.</i>	4. „ Boards of Inquiry by General Officers .. .. .	<i>ib.</i>
		5. „ Sir John Cope's case in 1746 ..	194

## CHAPTER XII.—continued.

Par.	Page	Par.	Page
6. I. Two purposes—(1) of Administration; (2) Government of the Army .. .. .	195	18. II. (b) To report on Discharged Soldiers .. .. .	201
7. „ (1st) as to purposes of Administration .. .. .	ib.	19. „ (c) „ „ Soldier's Bodily Injuries .. .. .	ib.
8. „ (2nd) „ „ „ Government .. .. .	196	20. „ „ „ „ Same .. .. .	202
9. „ For either purpose. How conducted. Mr. Windham's statement .. .. .	ib.	21. „ (d) „ „ Soldier's Desertion .. .. .	ib.
10. „ Confirmed by the Common Law Courts .. .. .	197	22. „ „ „ „ Same .. .. .	ib.
11. „ As to the Chelsea Inquiry in 1856 .. .. .	198	23. „ „ „ „ Same .. .. .	203
12. „ As a Grand Jury, with secrecy .. .. .	ib.	24. „ (e) „ „ Soldier's Claims .. .. .	ib.
13. „ As to the use to be made of the information .. .. .	199	25. „ 2ndly. Under the Regimental Debts Act, 1863: Effects and Debts of Officers and Soldiers .. .. .	ib.
14. „ As to amending method of procedure .. .. .	ib.	26. „ (f) For the collection of Assets .. .. .	204
15. II. As to those under Statutory authority: Enumeration thereof .. .. .	200	27. „ 3rdly. Under the Volunteer Act, 1863 .. .. .	ib.
16. „ (1st) As under Articles of War .. .. .	ib.	28. „ (g) Assembly of these Courts of Inquiry .. .. .	ib.
17. „ (a) To report on Wounded Officers .. .. .	ib.	29. „ As to the manner of conducting these Courts .. .. .	205
		30. „ Distinction as to Courts on the 1st and 2nd Division .. .. .	ib.

## APPENDICES.

	Pages
A. (Chap. II.).—THE FIRST MUTINY ACT AS AMENDED TO THE YEAR 1717 .. .. .	207-209
B. (Chap. II.).—MUTINY ACT, 1873, WITH NOTES .. .. .	210-249
C. (Chap. II.).—ARTICLES OF WAR, 1873, WITH NOTES .. .. .	249-310
D. (Chap. II.).—QUEEN'S REGULATIONS, "DISCIPLINE" .. .. .	311-318
E. (Chap. II.).—QUEEN'S REGULATIONS, COURTS-MARTIAL PROCEDURE, COURTS OF INQUIRY, AND BOARDS .. .. .	318-325
F. (Chap. II.).—RECORD OF COURT-MARTIAL PROCEEDINGS .. .. .	326-336
G. (Chap. II.).—FORMS OF AUTHORIZED CHARGES .. .. .	337-347
H. (Chap. VII.).—ORDER IN COUNCIL AS TO ARMY DISCIPLINE ON WAR SHIPS .. .. .	347-349
I. (Chap. IX.).—NOTE ON THE LAW OF EVIDENCE .. .. .	349-360
J. (Chap. XI.).—LEGAL RESPONSIBILITY OF CIVIL AND MILITARY AUTHORITIES IN CASE OF RIOTS .. .. .	360-365
K. (Chap. XI.).—CAPITAL PUNISHMENT ON PRISONERS OF WAR .. .. .	366-367
L. (Chap. XII.).—REGIMENTAL DEBTS ACT, AND REGULATIONS .. .. .	368-377
M. (Chap. XI.).—VOLUNTEER ACT, 1863, AND REGULATIONS AS TO COURTS OF INQUIRY .. .. .	378-380

INDEX TO (1) THE TEXT, (2) THE MUTINY ACT, (3) THE ARTICLES OF WAR, 1872 .. .. .	381-411
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THE  
ADMINISTRATION OF JUSTICE

UNDER

~~MILITARY AND MARTIAL LAW~~

NOTE.

*For insertion between p. vi. and p. vii. Preface to Military and Martial Law, 1874.*

These words have been added to Section 101 of the Mutiny Act, 1874 :—

“No Court Martial shall, in respect of the conduct of its proceedings or the reception of evidence, be subject to the provisions of the ‘Indian Evidence Act, 1872,’ or any Act of any Legislature other than the Parliament of the United Kingdom.”

might be supposed to require. And, however, that a volume on  
“Military Law” is said to be needed by the Military profession, I have ventured, in the present volume, to place at their disposal such information as some years of official investigation have enabled me to acquire upon that subject, intending in these pages to give a brief outline of the “History of the Military Code both before and under the Mutiny Act,” and at the same time to provide a legal Manual of “The Administration of Justice under Military and Martial Law,” for those who—in the discharge of the practical duties of professional life—may have

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<sup>1</sup> Vol. I. Chap. VIII. The reader will be pleased to note that when a Vol. alone is cited (as in this instance), the work is ‘The Military Forces of the Crown,’ (John Murray, 1869).

either to study or to administer the Law which governs the Army.<sup>1</sup>

2. The method which I have adopted in dealing with the subject is the result of the peculiar conditions under which the Law for the Government of the Army has been established and administered, differing essentially as these do from those under which "The Civil Administration of Justice" has been perfected. Our Civil Institutions, as fostered in their growth and development by the free thought and action of the whole community, are familiar at least in outline to every reader, but of our "Military Institutions" little was ever known, and nothing<sup>2</sup> recorded, until the present century. Raised as the Army originally was under an influence supposed to be antagonistic to freedom,<sup>3</sup> the people have willingly remained ignorant of those peculiar laws and institutions under which both officers and soldiers were governed.

3. Information which is so abundant for the use of the writer on Constitutional, can therefore scarcely be said to exist in relation to Military Law. The rights which, whether public or private, every *citizen* enjoys, are secured to him by permanent Laws—as the Great Charter or the Statute of Frauds. Having remained for centuries upon the Statute Book, not only has their meaning been rendered explicit by the aid of great Jurists and commentators, but their language has become interwoven with our National History. With almost equal truth the same remark may be applied to our Judge-made Law. All legal controversies being settled in open court at Westminster, after a public discussion, in the presence of a learned audience, the reported decisions of Coke or Hale, Holt or Mansfield—have declared the law for the security of society not only in their time, but in succeeding years.

4. Essentially different are the conditions under which information on Military Law is to be obtained. In the first

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<sup>1</sup> In this respect I have had the advantage of many useful suggestions from my friend Major-General Erskine, late Inspector-General of Volunteers, and now in command at Chatham, who perused the pages as they passed through the press.

<sup>2</sup> Bruce's Work, published in 1717, relates rather to the Military Laws of Greece and Rome than of England.

<sup>3</sup> The Army under the Stuarts, see Vol. I. Chaps. III. and IV.

aspect of the case, no permanent Statute relating to the administration of justice in the Army exists on the Statute Book;<sup>1</sup> in the other aspect, the Jurisdiction exercised by Military tribunals has been advisedly withdrawn from public observation. The officers acting as Judges have dealt with each case before them without the aid of legal precedent or of forensic argument, and their decisions have been buried in the oblivion of the War Office. Obviously, therefore, a writer on Military Law can glean, under ordinary circumstances, few materials from sources similar to those which furnish to any writer on Constitutional Law both information and authority.

5. Now if the Military Code really stood upon slender warranty, it probably would be received by the Army with little confidence. Apparently arbitrary in its provisions and severe in its punishments, such a code needs, far beyond any other, both the sanction of experience and the weight of high authority to command a loyal acceptance. In presenting the Code under which the Army is now governed to the notice of the reader, my object, therefore, will be to show that, all the essential conditions in relation to the Administration of Justice, can be traced in earlier Codes, and that Military Law, as a system established and understood in the service, has been gradually developed and improved. So far from being either framed without experience or unsanctioned by authority, the Code, in its main characteristics, has governed the Army for centuries,—been administered by experienced Generals,—repeatedly sanctioned by the deliberate judgment of Parliament,—and upheld after argument by the Constitutional tribunals not only of our own country, but of a kindred race.<sup>2</sup>

6. From the year 1629, there will be no difficulty in showing, from the Articles of War issued from time to time by Royal authority, and the Court-martial Records which are still extant, what were the provisions of the Military Code, and the modes of procedure prior to the Mutiny Act. In our inquiry these Codes and Records may fairly be accepted as standing in

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<sup>1</sup> As to the early Law, see Vol. I. pp. 345-355.

<sup>2</sup> In the authorised reports of the American Courts, cases on Military Law and procedure are not (as will be seen from these pages) of unfrequent occurrence.

lieu of Statutes and legal decisions in Constitutional History; and although some of these documents will be used and cited in these pages, with but little authentication save that which may be derived from the place in which and the person by whom this Work is written, yet they will, I hope, be accepted as authentic. Articles of War prior to the present century do not appear to have been regularly printed or published;<sup>1</sup> and those anterior to the reign of George I. have little authentication, except that of being found (as copies) in the War Office. There is, however, no reason that I know of to impeach their authenticity, and absolute credence may, I believe, be given to them.<sup>2</sup>

7. But at the threshold of this inquiry lies the subject of "Martial Law;" and as "Martial Law" and "Military Law"—for some years deemed terms synonymous—continue to be used indiscriminately by some authors to express the same meaning, a few paragraphs must be written to explain, first, their common origin, and then to show under what circumstances "Martial" became distinguished from "Military" Law, and how the one has been condemned and the other system upheld by Parliament.<sup>3</sup> The illustrations well suited for this purpose are the two Commissions of Charles I.—the one issued (in 1625), before and condemned by, the Petition of Right (1628); the other (in 1638) after that Petition, and declared by the Judges to be illegal.

8. The Commission of 1625 (directed to the Lord Marshal and Serjeant-Major of the Army, with twenty-three other Civil and Military Persons) was in substance as follows:—It stated that the Soldiers lately returned home would be billeted in certain places (as Plymouth,<sup>4</sup> Devon, and Cornwall), and then averred that disorders and outrages might be timely prevented. The King (more desirous of keeping his people from mischief

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<sup>1</sup> They are not to be found in the War Office. I have an octavo edition for 1749, and that is all.

<sup>2</sup> Since this was written, General Adye, C.B. (the distinguished grandson of the author of 'Military Law') has called my attention to original prints of the Articles of War, 1639 and 1640, in the library of the Royal Artillery at Woolwich. These formerly belonged to Grose, and at his death were purchased by Captain Adye.

<sup>3</sup> See this distinction further insisted upon, Chap. X. par. 3.

<sup>4</sup> 18 Rym. F., p. 255.

than of punishing them for the same) gave the powers which the Commission contained to the Commissioners, or to any three of them, within the places named—1st, to proceed, according to the Justice of Martial Law, against enlisted Soldiers and other dissolute persons joining themselves with them, and to punish them for robberies, felonies, mutinies, or other outrages or misdemeanours which, by Martial Law, ought to be punished by death; 2nd, by summary course, as used in Armies in time of War, to proceed to trial and condemnation of such offenders, and to put them to death according to the Law Martial for an example of terror to others, and to keep the rest in due awe and obedience; 3rd, to erect the Gallows or Gibbets in such places as the Commissioners thought fit, and to execute the offenders in open view, “as a warning to others to demean themselves as good subjects” ought to do. The concluding and mandatory part of the Commission was addressed to all Mayors, Sheriffs, Justices, and Peace Officers, charging them, on their allegiance, to aid and assist the Commissioners in the due execution of this “our Royal Commandment,” as the Commission was designated.

9. This Instrument shows (according to the theory of Royal Power then asserted) what Martial Law was supposed to be—viz., the arbitrary right to punish or destroy, without legal trial, any assumed delinquent. Such an authority, when exercised, was a direct violation of the fundamental Laws of the Land, as those Laws were thus emphatically upheld by Parliament in their Petition of Right:—

“Whereas by authority of Parliament, in the 25th year of the reign of King Edward III., it is declared and enacted, That no man shall stand forejudged of life or limb against the form of the Great Charter and the laws and statutes of this Realm; And by the said Great Charter and other laws and statutes of this your Realm, no man ought to be adjudged to death, but by the laws established in this your Realm, either by the customs of the same Realm or by Acts of Parliament; Whereas no offender, of what kind soever, is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your Realm; Nevertheless of late, divers *Commissions*, under your Majesty’s great Seal, have



issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed, within the land, *according to the justice of Martial Law*, against such soldiers and mariners, or other dissolute persons joining with them, as should commit any murder, robberies, felony, mutiny, or other outrage or misdemeanor whatsoever; and by such summary course and order as is agreeable to *Martial Law*, and is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the Law Martial:

“By pretext whereof some of your Majesty’s subjects have been, by some of the said commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by no other ought to, have been judged and executed:

“And also sundry grievous offenders, by colour thereof claiming an exemption, have escaped the punishment due to them by the laws and statutes of this your Realm, by reason that divers of your officers and ministers of justice have unjustly refused or forborne to proceed against such offenders according to the same laws and statutes, upon pretence that the said offenders were punishable only by *Martial Law*, and by authority of such commissions as aforesaid; which commissions and all others of like nature are wholly and directly contrary to the said laws and statutes of this your Realm:

“They do therefore humbly pray your most excellent Majesty . . . . that the aforesaid commissions for proceeding by *Martial Law* may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty’s subjects be destroyed or put to death contrary to the laws and franchise of the land.”<sup>1</sup>

10. The Commission of 1638 (issued on the occasion of Charles I. raising an Army to quell Rebellion in the North of England) was directed to Lord Arundel (as General of the Army to be raised to resist Tumult, Seditions, or Conspiracies against the

<sup>1</sup> Statutes of the Realm, Vol. v. fol. 24.

King or State), and gave him power to Command and employ the Army for such Executions, Offences, or Services as might be ordered under Royal Sign Manual.

11. Two distinct purposes were, however, embraced in this Commission. The first was to execute against all Rebels "**Martial Law**," for the purpose of suppressing the Rebellion, "**as to save whom you shall think good to be saved, and to slay, destroy, and put to execution of death such and so many as you shall think meet by your discretion to be put to death by any manner of means, to the terror of all other offenders;**" and the second was to govern the Army under what may be termed **Military Law**. Thus, "**as well by yourself as by your deputies, to hear all criminal causes growing and arising within the Army, as well concerning the death of any person as loss of members and all causes civil, whatsoever they be,**" and "**to make and ordain Ordinances for the good government, rule and order of the Army,**" with the power of enforcing them by Capital Punishment.

12. Both purposes, so far as they were to be carried out by punishments affecting the life or limb of the offenders, were alike illegal; for Rushworth<sup>1</sup> has preserved a letter (under date of 13th July, 1640) from Lord Conway, a Lieutenant-General in the Northern Army at Newcastle, in which he thus writes of the illegality of similar powers entrusted to or, at least, executed by the Duke of Northumberland:<sup>2</sup>—

"My Lord of Northumberland did write to me, that having had occasion to look into the power he hath to give commissions, the lawyers and judges are all of opinion that **Martial Law** cannot be executed here in England, but when an enemy is really near to an army of the King's and that it is necessary that both my Lord of Northumberland and myself do take a pardon for the man that was executed here for the mutiny. If this be so, it is all one as to break the troops, for so soon as it shall be known, there will be no obedience; therefore put some remedy to this by all means very speedily. There are now here in prison two men for killing of men, and the Provost

<sup>1</sup> 3 Rush. Col., p. 1199.

<sup>2</sup> See these Arts. of War, printed in Grose, Vol. ii. p. 107 (1788).

Marshal for letting them escape out of prison, although he took them again; I do forbear to call them to a council of war, neither dare I tell the reason why I do not, being often urged, but suffer them to think me negligent. I do not think it fit that the lawyers should deliver any opinion, for, if the soldiers do know that it is questioned, they will decide it by their disobedience, as the country doth by their ship-money, and with far more dangerous consequence, for the soldier may bring the country to reason, but who shall compel the soldier? Therefore, if it cannot be helped with a commission of *oyer and terminer*, which must be only in the officer or officers of the army, or in some special commission of the King's, such as he gives when noblemen are arraigned; let him then give under his own hand a commission for the execution of Martial Law, to him that will hazard his life and estate upon the King's word. Sir Jacob Ashley hath no Commission for the execution of Martial Law; but if the fault deserve death, he is to advertise my Lord of Northumberland. This will absolutely undo all. The soldier must be punished by his officer; if it would come to debate, some may peradventure say, that for faults that deserve death, the soldier may be sent to the gaol to be tried by the judges. This will take away the respect of the soldier to the officer, and there will presently be no obedience or care either in soldier or officer. I think that this doth so much more concern the King in the government of the Army, that if a lawyer should say so here, if I had a commission, I would hang him, and so I think the King ought to do others."

13. From this period no such Commission, expressly given by the King to a General Officer for the execution of his subjects under "Martial Law," has been known of in England. For the suppression of the Rebellion in Ireland a Commission, in terms nearly similar to that of 1638,<sup>1</sup> was given by William III. to Marshal Schomberg, which he carried into execution there. But "Martial Law," as a measure of justice, has had no existence in this Kingdom since the close of Monmouth's Rebellion.

14. Leaving, therefore, the subject of "Martial Law" for the

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<sup>1</sup> C. M. Bk. (114), p. 96.

present, but to be resumed hereafter,<sup>1</sup> an endeavour will be made to give an outline of the several Military Codes that were in force during the reigns of the Stuarts, and to explain how Justice was administered in the Army under those Military Tribunals which were first established by the Royal Prerogative, and ultimately received the sanction of Parliament.

15. The Articles of War put forth by Charles I. A.D. 1629,<sup>2</sup> by the advice of the Council of War, were expressed to be "for the government and good ordering of the Troops in England, either in an Army, or in Regiments, or in single Companies." Dealing with moral and religious duties, the Code sought to enforce these against the Soldiers by various minor punishments, *e. g.*, by branding with hot iron for swearing; seven days' imprisonment, with bread and water, for drunkenness; or for drunkenness on guard by strappado. Acts of violence or uncivil speech, either against his Majesty or any person in authority, were to be punished by death and without mercy. With regard to Military duties or offences, the Code was framed upon the assumption that the Soldier, and not the Officer, was the usual offender; but both Officers and Soldiers were to be sworn "to be faithful to his Majesty, both in thought, word, and deed: not to conceal anything not for his service which they saw or heard; and to obey all his lawful commandments."

16. The Administration of Justice "to hear, judge, and determine any fact done by Soldiers," was given to the Marshal's Court, having, however, "no power to put to death till they had advertised the General that shall have authority for life and death for such Troops as he shall command."<sup>3</sup> In every Market there was to be a gibbet and strappado, and in every Borough "a Provost with a prison ordained for Soldiers apart from any other." The Code concluded with an article which probably contained a description of the Provost-General's duties as then understood. "The Provost must have a horse allowed him, and some Soldiers to attend him, and all the rest commanded to obey him and assist him, or else the Service will suffer; for he is but one man and must correct many, and therefore he cannot be beloved."<sup>4</sup> And he must be riding from one Garrison to

<sup>1</sup> Chap. XI., *post*.

<sup>2</sup> Vol. I. p. 18.

<sup>3</sup> Turner, p. 203.

<sup>4</sup> For illustration in modern times, see Vol. vii. Gur. Desp. p. 169.

another, to see that the Soldiers do no outrage nor scath about the country."

17. The Laws and Ordinances of War put forth in 1639 under the authority of the Royal Commission of 1638 before referred to,<sup>1</sup> were addressed to the Officers and Soldiers of the Northern Army, "which Laws being thus ordained and proclaimed, all the persons were to swear thereto, and thereupon to observe and keep them under the pains and penalties therein expressed." In one particular only, viz., in their political colouring, these Articles varied essentially from those of 1642. Each Code dealt with different subjects under distinct headings. For instance, in the Code of 1639. (1) "Religion and Moral Duties," in thirteen Articles. (2) "The Safety of the Army Royal," in twelve Articles. (3) "Captains' and Soldiers' Duties in Particular," in twenty-nine Articles. (4) "The Camp or Garrison," in sixteen Articles. (5) "Lawful Spoils and Prizes," in five Articles. (6) "The Administration of Justice," in fourteen Articles. While the Code of 1642<sup>2</sup> had twelve separate headings, as (1) "Duties to God," in three Articles. (2) "Duties in General," in five Articles. (3) "Towards Superiors and Commanders," in ten Articles. (4) "Moral," in seven Articles. (5) "Soldier's Duties touching his Arms, &c.," in seven Articles. (6) "In Marching," in four Articles. (7) "In the Camp and Garrison," in eighteen Articles. (8) "In Action," in eleven Articles. (9) "Of Commanders and Officers in Particular," in twelve Articles. (10) "Of the Muster Master," in six Articles. (11) "Of Victuallers," in four Articles. (12) "Of Administration of Justice," in nine Articles.<sup>3</sup>

18. The King's Army was enlisted to uphold his authority, then contravened by Parliament; therefore, by the Code of 1639, "whoever should presume to say or insinuate that the Army was unlawful or unnecessary should suffer as a rebel,"

<sup>1</sup> Vol. I. p. 429.

<sup>2</sup> Vol. I. p. 442.

<sup>3</sup> Most of the Articles of this Code "are literally the same" as those issued by the Earl of Northumberland for the government of the Royal Forces, in 1640. So that both armies, though opposed to each other, were governed by the same Military Code.—See Grose's 'M. Ant.,' Vol. ii. p. 107, note. Chap. II. par. 46, *post*. The present Duke would appear to have the original Articles of 1639. See 3rd Report on Historic Manuscripts (1872), p. 81.

while the Officers and Men were sworn, not only to allegiance, but "constantly to oppose all seditions and treasons against the Royal Dignity." The Code itself was made binding by oath, "The Soldiers, holding up their hand or fingers and saying, 'We hold all these Laws and Ordinances as sacred and good, and will conform, fulfil, and keep them to the uttermost of our power.'" The Code of 1642, however, imposed no oath, neither was the King's name or authority mentioned; but "any one using words tending to the death of the Lord General," was to suffer death. Both Codes constrained the Soldier to implicit obedience to his Commanding Officer, and contained an explicit prohibition against seditious or mutinous meetings. Such a meeting "to demand their pay," was, by the Code of 1642, punishable with death.

19. The Administration of Justice was better provided for in the Code of 1639 than in that of 1642. The first Article gave authority "to the Council of War and the Advocate of the Army to enquire of the actors and circumstances of offences committed, by the oaths of such and so many" as they thought convenient, using "all means for examination and trial of persons delated, suspected, or defamed." This Article had reference to the "Justice of Martial Law," and to persons other than Soldiers who were deemed to be offenders against the King; for the second Article declared, in words nearly identical with those used in the Code of 1642, "That all causes and controversies arising betwixt Captains and Soldiers, and all others within the Camp, should be heard summarily, and execution done according to the Military Laws by the Council of War," without appeal, "unless circumstances required stay or deliberation." All proceedings in the Marshal's Court were to be truly recorded (even the Wills and testamentary dispositions being registered therein); but neither Code fixed any limit to the General's authority, nor laid down any rules for the formation of the Marshal's Court, nor for its method of procedure.

20. In the severity of punishment little difference is to be traced in either Code. In that of 1639 by thirty-four, and in that of 1642 by forty-three Articles, death was the punishment prescribed for various offences. The lesser punishments, besides loss of pay or office, fine, and imprisonment, were those of

burning the tongue with a hot iron, whipping, bastinado by his Officer, riding the wooden horse, bread and water, servile office in the Army, besides such other punishments, not extending to life or limb, as the Court-martial should award. The gaoler and executioner was the Provost; he was bound to hold every prisoner committed to him till discharged by Warrant, and to see all judgments, sentences, and commands of the Lord General and Council of War put in execution. Both Codes contained an Article providing that if Regiments or Corps failed in their duty (defined in the Code of 1642 as retreating "before they came to handy strokes"), the officers and every tenth Soldier should be punished with severity, and the other of the Soldiers should be put to servile offices in the Army "until by some brave exploit they purge themselves." The last clause in each Code was in substance and effect that Article which in Lord Hardinge's time the Soldiers called "the Devil's Article," viz., for punishing indefinitely crimes for which no special Order had been set down.<sup>1</sup>

21. During the Reign of Charles II. the Military Code and the Administration of Justice assumed the definite outlines in which both were adopted by Parliament in the Reign of William and Mary. The Parliament of the Restoration gave no sanction to Military Law: on the contrary, it established a Militia force in each County, committing the discipline to the Lieutenant and his deputies, with the aid of the Civil Magistrates, to whom was given the power of fine and imprisonment.<sup>2</sup> Both Houses were teeming with loyalty to the King and abhorrence of the late Rebellion; therefore they imposed on every Militia Officer and Soldier the oath,<sup>3</sup> "That it is not lawful, upon any pretence whatever, to take arms against the King, and that I do abhor that traitorous position that arms may be taken by his authority against his person or against those that are commissioned by him in pursuance of such Military Commissions."

22. But before the establishment of the Militia, the King had been permitted by Parliament, as already mentioned, to retain

<sup>1</sup> Vol. I. p. 439; and his Evidence "Military Punishments," 1836, p. 297.

<sup>2</sup> Vol. I. p. 34; 13 & 14 Car. II. c. 3, secs. 8-10.

<sup>3</sup> Sec. 19.

at his own cost a body of Soldiers<sup>1</sup> designated, for many years afterwards, "His Majesty's Guards and Garrisons," and ultimately forming the "Standing Army" referred to in the Bill of Rights and Act of Settlement. Fearing lest the country should have to pay for these Troops, if Parliament recognized them, the King was left to govern them under his Prerogative; and with that view he issued in March 1662-3, with Albemarle's advice, Orders (twenty-three in number) for the mustering, regulation, and payment of these Troops, six only of which had reference to strictly Military offences. "Laws and Ordinances of War" were to be thereafter issued "upon more mature deliberation;" meanwhile authority was given to the General to constitute Courts-martial, and to the "Judge Advocate of the Forces" to take information and depositions upon oath as occasion should require in all matters triable before Court-martial. "We will (these orders concluded) that in all cases wherein any person is to suffer the pain of death, no trial, execution, or proceeding be made, but according to the known Laws of the Land, if the crimes are punishable thereby, or otherwise by special Commission under the Great Seal by advice of our Judges."

23. The occasion for "Orders and Articles of War" arose, 1st, on the declaration of War by the French King in 1666, and 2ndly, on the anticipation of War in 1672. These Articles, as will be seen, develop the Military Code and system of Military Judicature subsequently established under the Authority of Parliament by the first Mutiny Act (and, indeed, now existing) for the better Government of His Majesty's Land Forces. The substance of these Codes must therefore be noticed.

24. The Code of 1666<sup>2</sup> was framed on the model of the Parliamentary Code of 1642. The contents were arranged under the same twelve headings, with one other (the second with two Articles) added, "of Duties to the King;" imposing in the first Article the penalty of death "upon any Soldier using any traitorous words against the King's person or authority," and in

<sup>1</sup> 12 Car. II. c. 15, and Vol. I. p. 53.

<sup>2</sup> Vol. I. p. 446, and par. 18, *ante*, and note.



the second, upon the Officers and men, that oath which the Statute Law had imposed on the Officers and Soldiers of the Militia force. These "Orders and Articles of War" were put forth "for the better ordering the Discipline and Government" of the Army, and all Officers and Soldiers were enjoined to keep and observe them as Military Orders and Articles. They were to be read at the head of every Regiment and in each Garrison on muster days; but there could be no pretence for saying, as it was suggested in Parliament, that these Articles were put forth as a commission of "Martial Law" against the Civil population.

25. "For the better administration of Justice," the Code established:—1st, a "General Court-martial" for offences punishable with life or limb; 2ndly, "Regimental" Courts for lesser offences not extending to such punishment; and 3rdly, "Detachment," with the powers of Regimental Courts. The General Court was to be appointed by the General in Command as often as occasion should require, consisting of thirteen Commissioned Officers, five at least to be Captains, and none under that degree when a Field Officer was to be tried. The Judge Advocate was to attend, to summon witnesses and to administer oaths, but there was no direction that the proceedings should be recorded. The Regimental Court was for the trial of Soldiers only, by their Officers; and the Governor of each Garrison was to have the power of forming a Court with similar powers by taking in (as occasion required) "a convenient number of Officers of the next adjacent Governor's." The Marshal, as theretofore, acting as Gaoler, had no discretionary disciplinary powers given him. He had to hold prisoners committed into his custody, but the Committing Officer was bound to deliver with his prisoner "the cause and reason of his imprisonment." Within forty-eight hours after the commitment, the Judge Advocate General was to be apprised thereof, that he might forthwith acquaint the General and obtain an order for a Court-martial or release the prisoner.

26. The Civil authority was so far interfered with, that the Justices were prohibited from imprisoning Officers or Soldiers except for capital crimes. Debts were to be proved by oath before the Judge Advocate General, and to be left for payment

for twenty-eight days before Civil remedies for recovery could be adopted. Criminal offences against the Civil population were made punishable before Court-martial; but there was no prohibition, other than that just referred to, against the action of the Civil Magistrate.

27. If we may believe Mr. Secretary Coventry's<sup>1</sup> statement in Parliament, the Articles of 1672, though bearing the King's name and authority, were put forth by Prince Rupert under his Commission, and were only to be executed abroad. They contained no "French Articles," but were in fact a careful collation of the best Articles from those put forth during the Civil War by Lords Essex and Strafford. Framed on the model of Lord Essex's Articles, 1642, they certainly deserve a careful consideration from those interested in the History of Military Law.

28. The Sections under which this Code was divided and the several duties prescribed were these:—(1) To Almighty God, Articles 1 to 6; (2) To his Sacred Majesty and Kingly Government, 7 to 10; (3) Towards Superior Officers and Commanders, 11 to 16; (4) In Marching or in Action, 17 to 21; (5) Where an enemy is subdued, 22 to 26; (6) In Camp or in Garrison, 27 to 36; (7) Of Musters, 37 to 53; (8) Victuals and Ammunition, 54 to 58; and lastly (9) For the Administration of Justice," 59 to 74.

29. "After the service of God Almighty, all Officers and Soldiers shall serve us faithfully to the best of their skill, power, and understanding;" and therefore an oath of fidelity in these terms was to be taken: To be true to the King and his lawful heirs and successors. To be obedient in all things to his General. To behave obediently towards his Superior Officers—in all they should command for the King's service; and lastly, to be a true, faithful, and obedient servant and Soldier—"every way performing my best endeavours for the King's service, obeying all orders, and submitting to all such rules and Articles of War as are or shall be established by His Majesty."<sup>2</sup> In the

<sup>1</sup> 4 Parl. Hist. pp. 605, 619.

<sup>2</sup> The native Indian soldier is sworn to allegiance "and to go wherever I am ordered, by sea or land," and to obey all commands of the officers set over him, "even to the peril of my life" (Art. 1, of 1869).

same spirit, death was imposed for the use of traitorous words against the King, or for enticing or persuading to join or engage in any traitorous or rebellious act.

30. Under the third Section, if any number of Soldiers should assemble to take counsel for demanding their pay, death was imposed on any Inferior Officers accessory thereto; and that or other punishment was to be awarded against the Soldiers by a General Court-martial. Both Officers and Soldiers "uttering words tending to Sedition, Mutiny, or Uproar," or hearing "any mutinous or seditious words spoken," without immediately revealing the same to their superior, were liable to such punishment as a Court-martial should think fit to award; but disobedience to a Superior Officer was only to be punished by dismissal, or such punishment as a Court-martial should award.

31. Justice was to be administered in the two Courts named in the Code of 1666, viz., that of the "General" for grave offences, and that of the Colonel of the Regiment for the lesser ones of Discipline. There was, however, no definition of the relative powers or authorities of these Courts. The number of Judges was not prescribed, but those of either Court were "to take an oath for the Administration of Justice according to these Articles or (where these Articles assign no absolute punishment) according to their consciences, the best of their understandings, and the custom of War in like cases." Every Judge was to deliver his vote or opinion distinctly; the sentence was to be by the plurality, or with the President's casting voice in case of the equality of votes. The Sentence, when given, was to be pronounced by the President, and execution to be done "on Warrant" by the Provost Marshal. In Criminal Causes affecting the Crown, the Judge Advocate General<sup>1</sup> had to inform and prosecute on behalf of the Crown; and of all proceedings by General Court-martial, a Clerk was to be sworn to make a true and faithful record.

32. The Regimental Court had primary Jurisdiction over

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<sup>1</sup> Turner, writing in 1671, lays down that "it is his duty to inform the Court-Martial what the Civil or Municipal Law provides," that the Military might not infringe upon the Jurisdiction of the Civil Courts. (*Pallas Armata*, p. 287.) While Tytler lays it down (in 1814), that in Courts-Martial he "has no judicial power," p. 353.

"all controversies either between Soldiers and their Captains and other Officers, or between Soldiers and Soldiers relating to their Military capacities;" but if either of the parties felt himself aggrieved, he had an appeal to the General Court-martial, subject to this penalty,—that if he failed to "make good his suggestion, he should recompense the other for the trouble and charge of such appeal." The internal discipline of the Regiment was in effect with the Captains, in subordination to the Colonel, and the Provost of each Regiment carried into execution the Sentence of its Court.

33. There was far less of arbitrary power in these than in other Articles of War, either of earlier or later date. I gather from them that the office of Provost Marshal (either Regimental or General) was to apprehend and hold offenders for trial; and when found guilty after trial, to punish them according to the sentence of the Court. In the execution of these duties no one was to hinder the Provost, except upon pain of death; but, on the contrary, all Officers and Soldiers were to aid him, or failing (on his request) to do so, they were to suffer such punishment as a Court-martial should award.

34. A redress of wrongs for the Soldier, or inferior against his superior Officer, was also provided. Permission was given to him to complain in the first instance to the Colonel, who (on due proof) was to redress the wrong, or, failing to do so, the party grieved might apply to his General for redress, subject to the wholesome punishment by Court-martial "if the accusation be false." Under no circumstances, however, was the Soldier to "take his own satisfaction."

35. These Articles—only to be brought into operation abroad, as it was alleged by Secretary Coventry—made no reference to the Civil power, and the jurisdiction of the Magistrate was not ostensibly interfered with. The King, however, in December 1672, issued a Proclamation<sup>1</sup> (which the Commons presented as a grievance) enjoining his subjects to appeal to the Officer for protection against any injury from the Soldier; and in case of need, through a Secretary of State, to His Majesty, that he (and not the ordinary Common Law Tribunals) might give relief to the person injured and punish the Soldier.<sup>2</sup> The Proclamation

<sup>1</sup> Vol. I. p. 453.

<sup>2</sup> Vol. I. p. 61.

was no doubt within the preamble of the Petition of Right, and was intended to operate "as a measure exempting the Soldier from the ordinary course of Justice." It occasioned, therefore, a strong feeling of opposition to be manifested in Parliament, and revived fears (never altogether dormant) against the re-introduction of "Martial Law" by Royal Proclamation.

36. Contrasting the Codes of 1666 and 1672, with regard to infliction of punishment, the latter was far more lenient than the former. In the first there were 42, but in the other only 22 Articles which awarded the punishment of death. Running the gauntlet and imprisonment in irons were added to the lesser punishments in the Code of 1666, which in other respects remained much the same in each, except that power was given by that of 1666 to inflict "arbitrary punishment," or as otherwise expressed, "arbitrary correction," which, so far as regards the expression used, is not to be found in that of 1672.

37. On the Rebellion of Monmouth, James II. put forth Articles of War (sixty-five in number), to remain in force during the Rebellion; but the later Military Code of James II., dated 1686, was in substance that of 1672, with clauses omitted and added,<sup>1</sup> besides such other modifications as may be easily explained. First, to the Oath of Fidelity was added the substance of the Militia Oath against the unlawfulness of taking up arms against the King. Secondly, to the Article (14) against Mutiny were added words inflicting capital punishment "on any person who should presume so far as to raise or cause the least Mutiny or Sedition in the Army." To the 4th Section, two Articles (17 and 18) were added, inflicting capital punishment "on Murder or wilful killing of any person," and the like punishment "on robbery or theft committed by any person in or belonging to the Army." To the last Section was added the Devil's Article (64), with this proviso, "that no punishment amounting to the loss of life or limb be inflicted on any offender in time of

<sup>1</sup> From Code of 1672; viz., 10, 24, 26, 27, 37 to 42, 44, 45, 50 [incorporated with 38], 51,

reducing	74 through
omission of 14 to	60
4 added	4
Total of	64

*King James's Code.*

Peace, although the same be allotted for the said offence by the Articles and the laws and customs of War."

38. The Code was altered in one other important particular, viz., in being made applicable to "rebels" as well as to enemies; so that (as in Monmouth's Rebellion) it might have been used against the Civil Community as such.<sup>1</sup> The King also put forth Directions with regard to Military Discipline, which are incorporated in a subsequent Chapter.<sup>2</sup>

39. Such, then, was the Code which was in force when the throne was declared to be vacant by the abdication of James II.<sup>3</sup> The Army were pledged by their oaths to his service, and when the Scotch Regiments refused to obey the orders of William III. but went on their way northward, declaring that<sup>4</sup> "James" was their king, the interference of Parliament became a political necessity, arising from no ordinary circumstances, but certainly not from a desire to ameliorate or amend the Military Code. Had Parliament not expressly sanctioned the change of dynasty, the punishment of the Soldier for Mutiny or Sedition against William III. would have been impossible. Hence the Mutiny Act of 1689, with its annual renewal, always encountered a strenuous opposition for many years at the hands of the Jacobites.

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<sup>1</sup> The Code here referred to—which is printed in Grose, 'M. Ant.,' Vol. ii. p. 139—was put forth to govern the Camp at Hounslow. There was another code of earlier date, judging by the references in the Court-martial Trials. See also Rules for regulating Courts-martial, C. M. Bk. (114), p. 49.

<sup>2</sup> Chap. VII. par. 9.

<sup>3</sup> It must not be forgotten that James II. put in force the old laws (see these printed, Vol. I. p. 351), against desertion, and got soldiers condemned to capital punishment as felons. *King v. Dale* (note p. 33, *post*).

<sup>4</sup> Vol. I. pp. 142, 497.

## CHAPTER II.

## THE MILITARY CODE AFTER THE MUTINY ACT.

1. THE political attitude assumed by the Regiments on the Scotch Establishment in declaring for King James II., and their open Mutiny in his favour, obliged Parliament to confer upon William III. those Statutory Powers for the suppression of Mutiny which are to be found in the Act printed elsewhere.<sup>1</sup> In the circumstances under which the country was placed, and regarding the urgency of the evil that needed an immediate remedy, no wiser measure could have been framed. In the short interval that elapsed between the appointment of the Commons' Committee to frame the Bill on the 13th and its acceptance by the Lords on the 28th of March, great Constitutional questions had to be debated and settled. Without giving any sanction to the undefined Prerogative of Proclaiming "Martial Law," or dealing with any other than those semi-political offences which then threatened the State with destruction, Parliament adopted—as will be clearly seen on a comparison of the Act with the preceding Articles of War—the existing Military Tribunals for their punishment; and, instead of exalting their own power by weakening that of the Crown over the Army, the two Houses confirmed and strengthened the latter by their Legislation.

2. In a carefully-worded Preamble, which, after nearly 200 years of party conflict, now remains, with but trifling amendments, as it was originally placed upon the Statute Book, the framers of the Act, while upholding the provisions of the Great Charter, "that no man should be prejudged of life or limb, or subjected to any kind of punishment by Martial Law or other-

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<sup>1</sup> Vol. I. pp. 142, 497, and *post*, Appendix (A).

wise than by the judgment of his Peers and according to the known and established Law of the Realm," nevertheless declared the necessity, so long as the Army was on duty, "of retaining an exact discipline." Not dealing with mere offences against discipline, but with those which would have rent the State asunder had Parliament not declared in favour of William III., and constrained the Army to allegiance, they limited their enactment thus:—"That every person mustered and<sup>1</sup> in pay as an Officer or Soldier in the King's Army found guilty by Court-martial of exciting, causing, or joining in any mutiny or sedition, or of desertion from the Army, should suffer death or such other punishment as that Court should award." The effect of the Act was, therefore, to leave all ordinary Military offences to be dealt with, as heretofore, by the Crown alone, but to give Parliamentary sanction to the infliction of Capital Punishment for certain specified offences which, whether regarded as Military or Political, it was expedient should be summarily punished by Courts-martial.

3. Direct authority was then given to the King or to the General of the Army to grant his Warrant to Officers (not under the rank of Colonel) for assembling Courts-martial from time to time for the punishment of offenders. These Statutory (as distinguished from Prerogative) Courts were never to consist of less than thirteen Officers—of the rank of Field Officers for the trial of Field Officers, or of Captains for the trial of other offenders. In all cases they were to have the power of swearing witnesses giving evidence before them, and the life of the accused was guarded by other securities laid down in the Statute: thus, "where the offender may be punished with death," the Judges were to be sworn upon the Holy Evangelists "well and truly to try and determine according to the evidence on the matters then pending between the King and the People."—they were to proceed in the trial "but between the 8 A.M. and 1 o'clock P.M.," and nine of them at least were to concur in the Sentence. Lastly, the Act—for the protection of the Civil Community—was limited to twelve months' duration.

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<sup>1</sup> "Or" in the Mutiny Act till the 6th of Anne



4. The Act, however, contained (as will be seen) one other Section, to which special reference must be made. Having, in the preceding Reign, established the Militia as localized forces under the command of the Lord Lieutenant, aided as to discipline by the Civil Magistrate, Parliament did not see fit on this occasion to alter these arrangements; a Declaration was therefore inserted that nothing in the Mutiny Act "should extend or by any ways be construed to extend to or concern any of the Militia Forces of the Kingdom."

5. Thus limited, the Act operated (1) only on "the Standing Army within the Kingdom," and (2) for the punishment of certain specific offences enumerated. When abroad, or for smaller offences at home, the Army was punished under the Articles of War put forth by the King or by the General Officer in Command. I cannot agree with the evidence, recently laid before Court-martial Commissioners to the effect, "that for the first twenty-eight years, from 1689 to 1717, there was a Mutiny Act alone, without Articles of War."<sup>1</sup> The Royal Sign-Manual Warrants of William III. show the contrary, while it is clear that Bruce, when he wrote his 'Military Institutes'<sup>2</sup> in 1717, had before him a printed copy of Queen Anne's Articles of War for his quotation from the 52nd—"that the Officers on Court-martial duty should be sworn not to receive any present or gratuity, directly or indirectly," for the discharge of their Office—is precise, and not to be found in the Military Code of the succeeding Reign. During these twenty-eight years, the Mutiny Act was not always in force;<sup>3</sup> and even when in force, provided only partially for the Military discipline of the Army by six disciplinary sections which could not either supersede or answer the necessity for the more complete Code laid down in the Articles of War.

6. Clauses relating to other matters than those of Military Discipline were from time to time added, until, at the close of Queen Anne's Reign, the Act contained enactments for Mustering the Army and for punishing false musters, for Billeting the Troops and payment for their quarters, for

<sup>1</sup> Questions 4085 and 4136. The Witness was under the impression that the Military Code, or rather the Mutiny Act, had never been revised or re-written.

<sup>2</sup> See p. 308, and Chap. III. par. 12.

<sup>3</sup> Vol. I. p. 389.

Impressment of carriages, and for many other miscellaneous necessities which had previously been regulated by Royal Warrants and enforced by Court-martial punishment without Statutory Authority. These it is not intended here to discuss, but it may be well to follow those Enactments which relate to Military Discipline until Articles of War for the Government of the Army at home—first during the Rebellion in 1715, and then in 1717—were put forth with Statutory Authority.

7. Viewed in this aspect, the Act underwent little alteration during the Reign of William III. In the sixth,<sup>1</sup> but in no later one, a prohibition was inserted that no Officer of the President's Regiment should sit or vote on a Statutory Court-martial; and in the ninth and last Act,<sup>2</sup> the Sections relating to Mutiny and Desertion were extended "to such Forces as the King had then on Foot in Ireland." At the close of his Reign, the Duke of Marlborough was appointed to the command of the Army in Holland; and, by his Commission of June, 1700,<sup>3</sup> he had that authority which the King himself had formerly exercised, of making "Rules and Ordinances for the Government of the Army," and of punishing all convicted offenders against the same by Courts-martial. The Officers forming these Courts were to be Field Officers or Captains, "whereof seven at the least were to be a quorum, and to judge of all crimes against the said Ordinances by a majority of voices." The Sentence of the Court was to be put into immediate execution or to be suspended at the discretion of the General. The Army abroad<sup>4</sup> was governed under Royal, and not under Statutory Authority, and throughout this Reign the Law remained substantially the same.

8. When Anne ascended the throne, amendments were introduced into the Act which must be noticed, as several of these in the Preamble are of Constitutional importance. In the first place, each Mutiny Act—after the first of Anne's Reign—

<sup>1</sup> 6 & 7 Will. and Mary, c. 8, sec. 3.

<sup>2</sup> 13 & 14 Will. III. c. 2, sec. 33. The Mutiny Act of 1846 (sec. 6), prohibited the Commanding Officer of the prisoner's regiment from being President of the Court-Martial which tried him. It was withdrawn in 1854 (see sec. 13).

<sup>3</sup> Vol. I. p. 490.

<sup>4</sup> Vol. I. pp. 187, 540; Vol. II. pp. 176-7.

was, by the insertion of an Introductory Clause, made both to define the purposes and to limit the numbers of the Standing Army. The purposes originally assigned in the Preamble<sup>1</sup> were (a) "the Present War, (b) the Safety of the Kingdom, (c) the Common Defence of the Protestant Religion, and (d) the Reduction of Ireland." Ireland being reduced, the (e) "War with France" was assigned for (d), and continued in the Preamble till 1701, when (f) "the Preservation of the Liberties of Europe" was placed in it.<sup>2</sup> In 1705<sup>3</sup> and until 1710, "the time of War" justified the continuance of the Army for the purposes previously alleged; but in 1711, as War could not be referred to, the original purposes (b, c, d, f) were retained. In 1712<sup>4</sup> the necessity for the continuance of the Army was placed on more intelligible grounds, as (g) "a Guard to Her Majesty's Royal Person, (b) the Safety of this Kingdom, and (h) the Defence of Her Majesty's Dominions beyond the Seas." During the Rebellion of 1715<sup>5</sup> (i) its suppression was substituted<sup>6</sup> as the reason for the continuance of the Army, but in the Act of 1716,<sup>7</sup> the Rebellion being suppressed, was of necessity abandoned, leaving (g) "the Guard" and (b) "the Safety" as the only reasons for the Army, until, from 1726 up to 1812, Parliament settled down "to the Preservation of the Balance of Power in Europe."<sup>8</sup>

9. The limitation of numbers was first introduced when the Preamble, in the Act for 1712, affirmed "it was judged necessary that a number of Troops, *not exceeding* 8000 men, be kept on Foot" for Guard and Safety, "and also a certain number (which was undefined) be kept for the Defence of His Majesty's Dominions beyond the Sea."<sup>9</sup> This limitation created a Parliamentary Compact, that no larger number of Soldiers than was here stated should be continued on foot by the Crown during the period of time to which the Act had reference.<sup>10</sup> Nor was it till the year 1814 that all the several Establishments

<sup>1</sup> 1 Will. and Mary, Sess. 2, c. 41.

<sup>2</sup> 1 and 14 Will. III. c. 2.

<sup>3</sup> 4 & 5 Anne, c. 22, and 9 Anne, c. 9.

<sup>4</sup> 12 Anne, c. 13.

<sup>5</sup> 1 Geo. I. and II. c. 34.

<sup>6</sup> In lieu of (h).

<sup>7</sup> 3 Geo. I. c. 2.

<sup>8</sup> 13 Geo. I. c. 4.

<sup>9</sup> 12 Anne, c. 13.

<sup>10</sup> Vol. I. pp. 86, 94; p. 262, note; Vol. II. p. 128.

for Troops abroad or elsewhere were thrown into one Establishment available at any part of the Empire.

10. The next amendment in the same Act has an important bearing on the general powers of the Crown to declare Martial Law, for in the second paragraph of the Preamble,<sup>1</sup> the words "in the time of Peace" were inserted after "subjected," and "within the Realm" after "punishment." The Crown, therefore, was no longer restricted by *Statute* from exercising the power (if otherwise valid) of declaring Martial Law in times other than those of Peace, or in places other than within the Realm. As the Act was also extended to Ireland, the Preamble was further amended by inserting after "Service" the words "within this Realm or the Kingdom of Ireland," and a Section added to the Enactments for carrying out this object.

11. Hitherto no statutory provisions had been enacted for the Government of the Army out of England, but, to effect this object, Sections (36 to 38) were introduced into the same Act, which enabled the Court of Queen's Bench or the Justices of Assize (with a Jury of the County in which the Court happened to be sitting) to punish any Officer or Soldier who out of England or on the high seas should (1) hold correspondence with any Rebel or Enemy, or (2) raise Mutiny or Sedition in the Army, or (3) refuse to obey his Superior, or (4) resist any Officer in the execution of his Office—the offence first mentioned as high treason, and the others as felony.

12. Neither had any reference whatever been made in prior Acts to the power which the Crown had exercised of issuing Articles of War, though it must have been within the cognizance of Parliament that such had been issued, and that the Army was in fact governed by them. In the Act which we have now under consideration, this reserve was broken, and a Declaration inserted that nothing in it should be held to abridge His Majesty's power to establish Articles of War, erect Courts-martial, and inflict penalties thereunder, as might have been done beyond the seas in time of War before the Act was passed.<sup>2</sup> To enforce these Articles in this country, and for the punishment of crimes and offences committed against them abroad,

<sup>1</sup> 1 Anne, sess. 2, c. 20.

<sup>2</sup> Sec. 39.

the Crown was authorized to erect Courts-martial<sup>1</sup> here; and as Desertion from the Army abroad was not a Statutory offence under any prior Mutiny Act, this one provided that, upon sworn information, a Justice might "for example's sake" send any such Deserter before a Court-martial to be transported to his Regiment for punishment.

13. The Law, as I have here defined it, remained without alteration during the Wars of Marlborough, but after the Peace of Utrecht the Mutiny Act needed several revisions. The tenth Act of this Reign<sup>2</sup> was the first ever passed for the Government of the Army in time of Peace, and was intituled "An Act for the better Regulation of the Forces." Death as a punishment was altogether withdrawn from the Military Code; and this leniency was the chief cause (if we may believe the Duke of Newcastle speaking before Parliament in 1749<sup>3</sup>) of the Rebellion of 1715. The theory which this Act (the 12th Anne) originated with an intention of mercy became in effect, by the substitution of punishment in the next Reign, a means of cruelty. It placed all crimes in one class or category, and for any offence limited the punishment to such as should "not extend to life or limb." Therefore for Mutiny, Sedition, or Desertion (theretofore punishable by death with a discretion to inflict a lighter punishment), or for refusal to obey, drawing or lifting a weapon against, or resisting an Officer, the same measure of punishment was declared, viz., such as should not "extend to life or limb" of the offender. The Crown thus became powerless to suppress the political action of the Army in favour of the Pretender, through the Agency of Military Tribunals.

By the same Act, a general power<sup>4</sup> was given to inflict Corporal Punishment by a Court-martial "for immorality, misbehaviour, or neglect of duty"—words which enabled the Crown to enforce against the Soldier the obligation which by the terms of his enlistment was laid upon him to serve the Crown faithfully.

14. The discipline of the Army abroad was left entirely in the hands of the Crown (those Sections giving a Jurisdiction

<sup>1</sup> Sec. 41.<sup>2</sup> 12 Anne, c. 13.<sup>3</sup> 14 Parl. Hist. p. 441.<sup>4</sup> Sec. 3.

to the Queen's Bench and Justices of Assize being withdrawn), and an express legislative power—though limited—was conferred upon the Crown to make Articles of War; to constitute Courts-martial for the trial of any crime or offence by such Articles, and to inflict penalties by sentence of such Courts: the power being expressly limited in its terms to the Dominions of the Crown beyond the sea (Ireland excepted), and was to be exercised—as theretofore it had been exercised—beyond the seas in time of War.

15. The Reign of George I. was the advent to Civil Commotion, and in the year three separate Mutiny Acts were passed. The first Act,<sup>1</sup> which received the Royal Assent on the 3rd June, bore the same title as, and was a renewal of, the mild Code of the 12th Anne; but, after a message from the Throne had announced to both Houses that a Rebellion was imminent, a Bill for “the better preventing Mutiny and Desertion” was passed, and received the Royal Assent on the 2nd of August. This second<sup>2</sup> was the re-enactment of the original Act of 1689, with a protecting clause against actions at Law, and another giving express authority to the Crown (in wider terms than would now be sanctioned) to make Articles of War under Royal Sign Manual for the better Government of the Forces at home.

16. The third Act, which received the Royal Assent on the 23rd March 1715 (O.S.),<sup>3</sup> stamped upon the Military Code that penal character which for some years made it a reproach to an Englishman to be a Soldier. Under the previous Acts two separate Codes existed: the mild one of the 12th of Anne, and the severe one of 1689—made more severe by the almost unlimited power of the Crown to declare new offences by Articles of War. This (third) Act adopted one classification of crime, and one measure of punishment; but, in lieu of that contained in the 12th of Anne, substituted Capital Punishment for every offence, but with a discretion to award such other punishment as the members of the Court-martial should see fit. Thus “one of the glories of our English Law,” as Blackstone terms it—viz., an ascertained quantum of punishment

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<sup>1</sup> 1 Geo. I. sess. 2, c. 3.

<sup>2</sup> Ib. c. 9.

<sup>3</sup> Cap. 34.

for every offence imposed according to the rule of Law, and not at the caprice of the Judges<sup>1</sup>—was extinguished, for, as he adds, if punishments are to be the private opinions of the Judge, then “men would be slaves to their Magistrates, and would live in Society without knowing exactly the conditions which it lays upon them.” Such, however, was the condition of the Army, so long as this Statute remained in force.

17. After the Rebellion had been crushed, it was the duty of Parliament to take under review the powers which in an emergency had been conceded to the Crown for the government of an Army, the main body of which had disappointed the rebels by their faithful discharge of duty,<sup>2</sup> though some members had been found guilty of desertion and punished with death.<sup>3</sup> At that period many Constitutional objections were urged which have prevailed against the Military Code as embodied in the Mutiny Act and Articles of War; but as it would be tedious to carry down in detail the history of each modification as and when made, I propose here to state briefly a few of the principal subjects of controversy, and to show how these difficulties were either then or subsequently disposed of.

18. Unfortunately the very existence of the Army was a subject of controversy; for, had the necessity of its continuance been admitted, the difficulties incident to legislation would have been materially lessened. As it was, a strong minority would have gladly seen the Military strength of the Crown first diminished, and then altogether extinguished. To legislate for Army Government was therefore distasteful to many, who were apprehensive<sup>4</sup> that in giving Statutory powers to the Crown for the punishment of the Soldier they were incidentally both sanctioning and perpetuating the principle that a Standing Army was essential for the protection of a free maritime State.

19. But, waiving these considerations and accepting for some time at least the incubus, first of 7000, and ultimately of 17,000 men, dispersed as Guards and in Garrisons throughout the kingdom, were they to be organized in localities and governed by the

<sup>1</sup> Vol. iv. Com. p. 371; and Debate of 1749, in Vol. I. p. 163.

<sup>2</sup> Vol. II. p. 164.    <sup>3</sup> Vol. I. pp. 179, 372; Vol. II. p. 258.    <sup>4</sup> Vol. I. p. 196.

Civil Magistrate as the Militia; or were they to have "Articles and Orders" enacted<sup>1</sup> by Parliament for their discipline, as was the case with the Royal Navy? These were the preliminary difficulties needing solution. The localization of Regiments was urged by those statesmen who objected to our keeping up the Army as a separate caste, alienated from the habits and sympathies of their fellow citizens, and moved about from month to month, that no attachment might spring up between them. It was, however, opposed successfully by the Duke of Marlborough,<sup>2</sup> and abandoned. The government by the Civil Magistrate was for some time held in abeyance, but the vote in supply (which always precedes the Act) having established the Army for one year, Sir Robert Walpole used his influence in favour of the renewal of the Mutiny Act, pointing out that, as the Army existed, it ought, for the welfare of the State, to be kept in discipline by the Military, and not punished by the Civil Magistrate.<sup>3</sup> The analogy of the Navy, as a force permanent and constitutional, was not adopted; and therefore the proposal<sup>4</sup> to enact Articles of War for the Army met with little encouragement, and failed.

20. These points being settled, the real difficulties of the case presented themselves. Was Parliament to concede to the Crown legislative power to declare offences—to erect tribunals—and to inflict punishments, contrary to the fundamental principles of English justice? A precedent could certainly be cited, where an English Sovereign had obtained such powers from a "servile" Parliament,<sup>5</sup> but only in the time of arbitrary power and when Parliament scarcely existed for any other purpose than that of registering the ordinances of the Sovereign. The Articles of War hitherto made by the King had been (as we have seen) issued as Military Orders which, under his oath of allegiance and service, the Soldier was held bound to obey; great caution was therefore needed in giving legislative sanction to such rules.

21. No such caution was, however, exercised; for Parliament enacted<sup>6</sup> that the King might establish Articles of War, and

<sup>1</sup> 13 Car. II. c. 19.    <sup>2</sup> Vol. I. p. 218.    <sup>3</sup> Vol. I. p. 153.    <sup>4</sup> Vol. I. p. 147.

<sup>5</sup> 31 Henry VIII. c. 8, and see Hallam, 'Const. Hist.,' Vol. i. p. 35.

<sup>6</sup> Vol. I. p. 146.



constitute Courts-martial, with power to try *any* crime or offence and to inflict any penalties. It is therefore scarcely to be wondered at that a power so unlimited in its extent and meaning should have formed a subject of Parliamentary controversy until restrained. This was done in the year 1749, when a proviso<sup>1</sup> was inserted "that within Great Britain and Ireland" no person should be adjudged to suffer any punishment extending to life or limb except for such crimes as are so expressly punishable by the Mutiny Act—a protection which, limited as originally framed,<sup>2</sup> is still to be found therein.<sup>3</sup>

22. But further: the 3rd Act not only too frequently and for trifling offences awarded the punishment of death, but a provision (which was to be found in it), enabling the Crown, or Military Officers, to declare the causes of death, presented a far more serious objection, thus: "Every Officer or Soldier who should refuse to obey the Military orders of his Superior Officer" was liable to capital punishment. The Army being then under the personal command of a Sovereign, absolutely irresponsible—for, according to our Constitutional theory, he could do no wrong—the danger of this enactment was not exaggerated by the Lords, when, in their protest, they declared it to be a violation of the fundamental Laws of the Realm, "by which the commands or orders of the Crown are bound and restrained within the compass of the Law; no person being obliged to obey them if illegal, but punishable by the Law should he do so, notwithstanding such orders or commands proceed from the King."<sup>4</sup> However oppressive to the Civil Community, or coercive against Municipal rights or institutions, the Inferior must obey the orders of his Superior Officer at the peril of Capital Punishment by a Court-martial summoned at his instance. And his injured fellow-subjects were left without legal redress,<sup>5</sup> because the same Act contained, as we have seen, clauses which practically exempted the Soldier from trial by the Civil Tribunals.

<sup>1</sup> 22 Geo. II. c. 5, s. 57; Vol. I. p. 147.

<sup>2</sup> See *King v. Suddis*, 1 East. Rep. p. 310.

<sup>3</sup> Sec. 1.

<sup>4</sup> Vol. I. pp. 157-164; Vol. II. pp. 66, 144, 154.

<sup>5</sup> 1 Geo. I. c. 9, s. 10, and c. 34, s. 40.

23. The alterations made in the Act of 1718 placed some limitation upon this penal obedience by using the words "who shall refuse to obey any *lawful* command of his Superior Officer." In 1733 the increase of the Army was opposed by several speakers, mainly from the danger to which this authority over the Army exposed the State. Discontent continued to be expressed until, in the year 1749, after an angry debate, the words were altered thus: "To disobey any lawful command of his Superior Officer," which now stand in the Military Code<sup>1</sup>—a slender security in itself against the perpetration of an irremediable act of violence, should the lawfulness of the command be of a doubtful or controversial character,<sup>2</sup> and one of little practical value should the Officers who give the commands be desperadoes instead of gentlemen.

24. It need not be a matter of surprise to learn that the extension of the Military Code to persons other than Officers and Soldiers in pay was most narrowly watched in Parliament until the punishments were mitigated and the Administration of Justice settled in public confidence. The first Extension was in 1708, when those serving as "Volunteers" without pay were brought under the Act,<sup>3</sup> then in 1715,<sup>4</sup> by the 3rd Act the "Invalids"—that is, Corps or Regiments composed of Pensioners acting under the command of retired, reduced, or half-pay Officers, who thus originally became liable to trial by Court-martial and so continued until 1783—were included. In 1754, the Local Army of the East India Company was brought under a special Mutiny Act,<sup>5</sup> and in the same year the Local Troops raised to serve with the British Army by the Governors of the American (in 1807<sup>6</sup> extended to all) Colonies, were brought under the Imperial Act.<sup>7</sup> Within two years, by the Militia Code of 1756,<sup>8</sup> the English Militia, hitherto exempt, were made liable to the Act, and the last great Constitutional struggle was on Mr. Fox's opposition, in 1788, to

<sup>1</sup> Mutiny Act, s. 15, Art. of War 38.

<sup>2</sup> Vol. I. p. 159, and Vol. II. p. 143. *Mitchell v. Harmony*, 13 How. (S.C.) 115.

<sup>3</sup> Vol. I. Chap. VIII. par. 98.

<sup>4</sup> *Ib.* par. 99.

<sup>5</sup> 27 Geo. II. c. 9.

<sup>6</sup> 47 Geo. III. c. 32, s. 100.

<sup>7</sup> Sec. 74 of 28 Geo. II. c. 4.

<sup>8</sup> 30 Geo. II. c. 25.

the enactment making the Civil Artificers—then to be enlisted as Sappers—liable to Military Law. From this period Parliament has manifested what by contrast appears to be a singular indifference to the extension of the Act.

25. It is a matter of surprise that no more effectual effort was made to frame and enact a classification of crime or punishment other than that laid down in the 3rd Act of 1715; for “one of the greatest advantages of our English Law is that not only the crimes themselves which it punishes, but also the penalties which it inflicts, are ascertained and notorious—nothing is left to arbitrary discretion—the King by his Judges dispenses what the Law has previously ordained, but is not himself the Legislator.”<sup>1</sup> No such attempt has been made, nor has Capital Punishment been withdrawn from the Statute Book, to the same extent with regard to Military as it has for Civil Crimes. The reform of the Criminal Law has not reached the Military Code.

26. But the punishment of death, though often awarded by Courts-martial for Desertion and sometimes for Sedition (as cursing his Majesty<sup>2</sup>) was not always carried into execution. When several men were sentenced for one common offence, an expedient was resorted to—as early as the reign of William and Mary, and continued in the Service during the Peninsular War—of ordering the condemned criminals to draw lots for their lives. Thus, in 1696-7, William III. extended his mercy to two out of three prisoners, by “ordering the three condemned Soldiers to draw lots, and that he only on whom the lot of death do fall be executed;”<sup>3</sup> and the Duke of Wellington, in 1813, having pardoned some and ordered others for execution, added to his orders, “That the remainder of the prisoners should draw lots for one more to be executed by being shot according to the Sentence of the Court-martial.”<sup>4</sup>

27. Again, by the Sovereign or the General in Command, “Corporal” was substituted for “Capital” Punishment awarded by the Court, the prisoner escaping with his life after a thrashing.<sup>5</sup> For many years there was no legal sanction for this course, and the Crown was advised in George I.’s reign that

<sup>1</sup> Blackstone (1756), Vol. i. p. 415.

<sup>2</sup> Vol. I. p. 504.

<sup>3</sup> Dec-p., Vol. vii. p. 177.

<sup>4</sup> Vol. I. p. 519.

<sup>5</sup> Vol. I. p. 518.

though the Sentence might be remitted it could not be changed.<sup>1</sup> "Let the prisoners," wrote the Duke of Wellington, "have the choice of suffering Corporal Punishment, or to be executed according to sentence. Those who prefer to be executed are to be shot; those who prefer corporal punishment are to receive a punishment not exceeding 300 lashes."<sup>2</sup>

28. Death for Desertion—which might not be too severe a punishment where the Soldier went over from the Army of the House of Orange or of Hanover to that of Stuart during the last century—was gradually withdrawn from the Code. First, in 1766, a discretion was given to Courts-martial, in cases where they thought death too severe a punishment, to award transportation for life or for years in Regiments serving abroad; and then, in 1803, Desertion was declared Felony, punishable with transportation. If the man wrongfully returned to this country, the Capital Punishment was then to be inflicted; but, as a rule, such punishment for ordinary Desertion ceased to be inflicted.<sup>3</sup>

29. Corporal punishments of various kinds, "not extending to life or limb," could, as we have seen, be inflicted by Courts-martial for "immoralities, misbehaviour, or neglect of duty;" but first the commutation, and later the abolition of this punishment was steadily sought from Parliament. In 1812 both Houses accepted the principle that "imprisonment might be inflicted as an alternative punishment for minor offences,"<sup>4</sup> and a limitation was first imposed upon the number of lashes to be inflicted,—300 being fixed upon as the limit. From that time the controversy raged with more or less earnestness, until in the year 1868 the power to sentence any Soldier to Corporal Punishment for any offence whatever committed during the time of Peace within the Queen's Dominions was withdrawn from the Act.<sup>5</sup>

30. The Military Code continued for many years without material alterations, other than those which have been already

<sup>1</sup> *Desp.*, Vol. vii. p. 510.

<sup>2</sup> *Desp.*, Vol. vii. p. 177.

<sup>3</sup> Vol. I. pp. 154, 503; Vol. II. pp. 3–41. James II. endeavoured to revive the old Law of Felony. *King v. Dale*, 2 Show Rep. p. 511 and 12 Sta. Tri. p. 262.

<sup>4</sup> See Sec. 22–4 of the Mutiny Act, 1812.

<sup>5</sup> 31 Vic. c. 14, s. 22.

mentioned in 1717. Many of the severer enactments were then withdrawn from the Act and placed in the Articles, the disciplinary Sections of which (so amended) are given in the Appendix (A), and the Articles of War, laid upon the table, will be found printed at length in the Journals of the House of Commons.<sup>1</sup> This year, therefore, will furnish a starting-point from which to review the Military Law in the practical portion of this Work.

31. Until the year 1828 the Mutiny Act underwent very little organic change. In the year 1717 it numbered 53, but in the year 1828 163 Sections. The order in which the Act was originally framed was but little altered, and the Sections that were from year to year added, related rather to the Administration than to the Discipline of the Army.

32. The Articles, so far as I can trace, stood upon the model of those of 1717 until 1742; but from this year till 1828, they were (as those of 1672 and 1686) grouped under different Sections, which in 1748 were twenty, and in 1828 twenty-four in number. They stood thus in 1748 as 11 in number:—(1) Divine Worship, 6; (2) Mutiny, 5; (3) Enlisting Soldiers, 2; (4) Musters, 7; (5) Rations, 4; (6) Deserters, 4; (7) Quarrels and sending Challenges, 5; (8) Sutling 3; (9) Quarters, 5; (10) Carriages, 1; (11) Crimes punishable by Law, 2; (12) Redressing Wrongs, 2; (13) of Stores, 4; (14) Duties in Quarters and in Field, 26; (15) Administration of Justice, 25; (16) Entry of Commissions, 1; (17) Half-pay Officers 2; (18) Effects of the Dead, 2; (19) Artillery, 2; (20) Relating to the foregoing Articles, 3; the concluding being the Devil's Article—which is not to be found in the Articles of 1717–42.

33. In 1828 they stood as 135 in number, thus:—The Section 1 to 14 as before set out, except that Section (4) had only 1 Article, (6) was increased to 7, (8) to 5, (13) to 6, and (14) was reduced to 22 Articles. From [15] to [24] Sections the order stood thus:—[15] Rank,<sup>2</sup> added in 1784 and 1794 as 7 Articles [16] Administration of Justice, 30; [17]<sup>3</sup> Accounts, added in 1784 as 3 Articles; [18] Entry of Commissions and Leaves of

<sup>1</sup> Vol. xviii. p. 910.

<sup>2</sup> Articles as to Militia and Yeomanry added in 1798.

<sup>3</sup> The Section relating to Half-pay Officers was omitted in 1750; Vol. I. p. 171

Absence, as 1 Article; [19] Effects of Dead and Deserters, as 4 Articles; [20] Artillery, as 3 Articles; [21] American or Colonial Troops, first added in 1755 as to American Troops, 2 Articles; [22] Troops in the East Indies, added in 1785 as 2 Articles; [23] Troops on board ship, added in 1795, as 1 Article; [24] As to the foregoing, as 5 Articles.

34. In the year 1829 the Military Code underwent entire revision, the Mutiny Act being remodelled and reduced to 78 Sections, while the Articles were re-cast and thrown into 7 Sections only, as—(1) Public Worship, 6; (2) Crimes and Punishments, 7 to 67; (3) Courts-martial, 68 to 93; (4) Miscellaneous Duties and Obligations, 94 to 112; (5) Returns and Accounts, 113 to 123; (6) Rank, 123 to 129; (7) Application of the Articles, 130 to 135, the total number of the Articles. In 1830 the place of some few Articles was changed and 9 others added,<sup>1</sup> relating to malingering and self-mutilation and disgraceful conduct.

35. Numerous alterations were made in 1844, and in 1847 the Military Code was again revised, and the Act increased as from 83 Sections in 1846, to 103 Sections in 1847.<sup>2</sup> In 1848 the provisions relating to Limited Enlistment were added, and the Articles of 1847 were re-arranged, and the Sections increased in number thus:—(1) Duties and Obligations, 1 to 34; (2) Crimes and Punishments, 35 to 108; (3) Courts-martial, 109 to 146; (4) Rank, 147 to 153; (5) Application of the Articles, 154 to 159.

36. The Code continued in this shape until the year 1860, when it was again re-cast, the substance of it being the same. The Act was reduced from 105 Sections in 1859<sup>3</sup> to 97 in 1860, and the Articles—the same Sections being preserved—were increased from 161 in 1859, to 195 in 1860. But the shifting of Sections and Clauses was such as to puzzle the readers of the earlier and later Codes.

37. The present Code, in regard to the Disciplinary Clauses thereof, is printed in the Appendix.<sup>4</sup> At the foot of each Section of the Act and Articles there will be found such detailed informa-

<sup>1</sup> These were 39 to 43, 50 and 51, 87 and 88.

<sup>2</sup> Compare 9 Vic. c. 11 with 10 Vic. c. 12.

<sup>3</sup> Compare 22 Vic. c. 4 with 23 Vic. c. 9.

<sup>4</sup> App. B and C.

tion as the reader may possibly desire for reference. As each Military Student is desired to make himself familiar with the contents of the Act and Articles<sup>1</sup> "so far as it is necessary for the performance of the duties of members of a Court-martial," these extracts are limited to that object. The form of Court-martial proceedings is also given,<sup>2</sup> with those Sections of the Queen's Regulations<sup>3</sup> which prescribe the mode in which these shall be conducted.

38. Before closing this history I cannot forbear this remark that one characteristic—which is worthy of being specially noted—has been preserved in every Code, viz., the allegiance enjoined upon the Soldier towards the Supreme Being.<sup>4</sup> The primary duty<sup>5</sup> traced in all the Codes, from that of 1639 was and is, that of "Divine Worship;" and though, in the year 1847, this section was transposed to another part of the Code yet the words remain nearly the same. In the earlier Treatise upon the Art of War, those authors thought it not unimportant to press this subject home to the attention of the Soldier; nor in later times have great Captains been silent upon it. When engaged in the struggle of the Peninsula, the Duke of Wellington wrote, "I am very anxious upon this subject, not only from the desire, which every man must have that so many persons as there are in this Army should have the advantage of religious instruction, but from a knowledge that it is the greatest support and aid to Military discipline and order;"<sup>6</sup> and those readers who may be familiar with the writings of the late Sir Charles Napier will recall his testimony to the same purport.<sup>7</sup>

39. Whatever party-strife hitherto hinged on the yearly renewal of the Act has now ceased. Did the Bill precede or form one of supply, a successful opposition would disband the Army; but this is not so, for when the resolution which defines

<sup>1</sup> War Office Circulars of 1st April and 28th May, 1872, for Reserve Forces.

<sup>2</sup> App. F.

<sup>3</sup> App. D and E.

<sup>4</sup> Extract from Articles of 1639:—"No enterprise shall be taken in hand, but the Company that are to execute the same shall first commend themselves to God and pray to Him to grant them good success."—Vol. I. p. 421.

<sup>5</sup> In Naval Discipline Act this is the 1st Section.

<sup>6</sup> Vol. iv., p. 584, February 1811.

<sup>7</sup> Life, Vol. ii. p. 458.

he number of men has been brought up and read a second time, then leave is given to bring in, and this number is stated in the Preamble of, the Mutiny Bill.<sup>1</sup> The Army, therefore, could be paid out of the supply, and its discipline be imperfectly maintained under the prerogative if the Mutiny Act were not passed. The effectual opposition is that made in the Committee of Supply either to the number of men, or to the period for which the vote is taken. The supply has therefore been granted for shorter periods than a year to oblige the Ministry to meet Parliament within that interval, and as the Mutiny Act follows upon supply its operation has been restricted to the same period.<sup>2</sup>

40. It is a rule established by Parliamentary usage, that nothing foreign to the subject or novel in principle, so as to lead to great delay or controversy, should be introduced into the Bill; for, if passed, the Act should come into immediate operation when the old one expires. The Roman Catholic Question was raised by Clauses in the Mutiny Bill, but withdrawn. In the same year (1806) the House objected to the principle of limited enlistment being so raised. In 1847<sup>3</sup> when the latter subject was again brought before Parliament, a Bill was presented in which the purposes of the Government were fully discussed, and, being adopted, were incorporated into the Mutiny Act of 1848.

41. From what has been written, it will be understood that the Bill always originates in the Commons; and so inflexible is the rule, that the amendments of the Lords on a Penalty Clause have been objected to, and their vote, either affirmative or negative, insisted upon. The first Bill was referred, after the second reading, to a Select Committee,<sup>4</sup> and in later periods it has been introduced by and carried through the House under the charge of the Civil Ministers<sup>5</sup> of the Crown. The Articles of War, on the contrary, were prepared by or under the advice of a Board of General Officers,<sup>6</sup> and were issued as Military Orders under Royal Sign Manual, but without the countersign of a responsible Minister. In 1794,<sup>7</sup> Parliament provided that

<sup>1</sup> Vol. I. p. 86.<sup>2</sup> Instances quoted, Vol. I. pp. 86, 11<sup>3</sup> *Ib.*<sup>4</sup> 10 Com. Journ. p. 53.<sup>5</sup> Vol. I. p. 11<sup>6</sup> Letters of 1715, Vol. I. p. 505.<sup>7</sup> 33 Geo. III. c. 9, a



they should be judicially noticed, and in 1810<sup>1</sup> that they should be sent "by the hand of the Secretary at War to the several Judges of the Common Law Courts." Both the Acts and Articles are evidenced (as ordinary Statutes) by the type of the Queen's printer.<sup>2</sup>

42. Leaving the Militia and Auxiliary Forces to be dealt with in a separate chapter, it appeared to me to be better to complete in outline the history of the Military Code as applicable to our Regular Army before referring, as I propose to do, to the discipline of the Royal Navy after tracing the general adoption of the Court-martial system for the Government of other Forces; such as (1) The Royal Marines, (2) The East Indian, and (3) The United States Army.

43. I. The Marine Regiments were originally raised (as elsewhere shown<sup>3</sup>) in 1694, and governed when on board ship under the Navy Discipline Act,<sup>4</sup> and when on land under the Army Mutiny Act. This continued until the year 1756, when the Marine Regiments were reorganized under the Command of the Lords of the Admiralty, who, by Commission from the Crown, exercise over the Marines the same powers as are directly exercised over the Army by the Crown. To meet this peculiarity, a separate Marine Mutiny Act (originally framed on the model of the Army Act) and Articles of War (similar to those for the Army) have been annually passed by Parliament and issued by the Lords of the Admiralty. This Code comes into operation by order of the Senior Naval Officer whenever the Marines leave Her Majesty's Ships to join the Army upon a joint expedition on land.<sup>5</sup>

44. All that has been written with reference to the Military Code up to 1756, is therefore applicable by express terms to the Royal Marines; and as their Code has always been from that period substantially the same—as it now is—with the Army Code, little qualification to the text is needed. When asked to explain to the Royal Commissioners on Courts-martial how the Marine differed from the

<sup>1</sup> 50 Geo. III. c. 71, s. 31.

<sup>2</sup> King v. Holt, 5 Te. Rep. p. 442.

<sup>3</sup> Vol. I. pp. 75, 264-265, 398.

<sup>4</sup> Chap. III. par. 8.

<sup>5</sup> Report of C.-martial Comrs. 1868, Q. 3885, and Sec. 6 Marine Mutiny Act.

Army Act, the Adjutant-General of the Marines<sup>1</sup> said "it was assimilated to the Army Act in every possible way: as regards the punishment of offences and Military economy generally, it was very nearly similar to the Army Act, and from year to year the alterations of the 'Army' were adopted into the 'Marine' Act." In the year 1871, to make the assimilation of discipline more complete, the Marine Articles of War<sup>2</sup> made the "Queen's Regulations for the Army" binding on the Royal Marines when serving on shore in England, and at all other times and places when under the Mutiny Act, in matters connected with Discipline, Drill, and exterior economy generally, and in all questions arising when serving in garrison or quarters with the Army, "except where special Regulations have or may be issued by the Admiralty," or where the form of procedure laid down in the "Queen's Regulations for the Army" is not applicable to the Royal Marines.

45. II. The Indian European Army (formerly of the Company)<sup>3</sup> was from 1754 to 1863 governed by a separate Code, framed on the model of the Mutiny Act.<sup>4</sup> In the latter year this was repealed,<sup>5</sup> and the Army in India was made subject to the Mutiny Act, several sections (now sections 99, 100, and 101) being transferred from the Indian Code to the Mutiny Act. The Native Army is not governed by the Mutiny Act, but by Articles of War enacted by the Legislative Council of India (who it may be noticed cannot repeal or in any way affect the provisions of the Mutiny Act<sup>6</sup>); those of 1869 (Feb. 26th) being the Code at present in force, and of which more will be written hereafter.

46. III. The American—though now unfortunately in legal parlance an alien—Army is governed by a Military Code "mainly derived" (as we are informed by a competent authority) from the English Code.<sup>7</sup> We have already seen how, in our domestic

<sup>1</sup> Evidence of Col. Lowder, C.B., Question 3881.

<sup>2</sup> Sect. vi. Art. 157.

<sup>3</sup> As to this, see Vol. I. pp. 268–270; Vol. II. p. 435; and Chap. X. par. 26–29.

<sup>4</sup> The first and last were 27 Geo. II. c. 9, and 20 & 21 Vic. c. 66. The Indian Officers holding Brevet Rank from the Crown were liable to both Codes in 1823. India Office Record (666).

<sup>5</sup> 26 & 27 Vic. c. 48.

<sup>6</sup> See 24 & 25 Vic. c. 67, sec. 22.

<sup>7</sup> Benét, p. 20.

troubles of the 17th century, the opposing Armies of the King and of the Parliament were governed under the same Military Code:—how, in fact, the Articles of War put forth by the Earl of Northumberland in 1640 were adopted, in substance always and in words often, by Lord Essex in 1642.<sup>1</sup> So, in 1775, the same thing happened in America. At that time the “Ministerial” Army, as our then fellow-subjects called Gage’s and Burgoyne’s force, was governed by our Mutiny Act and Articles of War. When the “Continental Congress” raised an Army in defence of the liberty of America, that Assembly could find no Military Code better suited to their requirements than the then current Articles of War by which this Ministerial Army was governed, and accordingly, on the 30th of June in that year, they put forth Articles of War (sixty-nine in number) for the government of their Army, which were framed (“with the Devil’s Article”<sup>2</sup>) on the model of the English, but with this marked difference—that by the American Code death was only three times named as a punishment—viz., as for the breach of Articles, which were 25, 26, and 31, in theirs, and are 52 and 54 in our Code.<sup>3</sup>

47. The present American (which is so similar to our own Military) Code, was enacted by Congress on the 10th of April, 1806; and, in illustration of it, the able writers upon Military Law and the Judges of the Supreme Courts in that country have not failed to draw largely from Works that have been here put forth upon our Mutiny Act and Articles of War. The decisions of the American Courts of Law and the opinions<sup>4</sup> of their highest Law Officer—the Attorney-General—upon State documents have furnished me with additional materials for this Work; for, where (as not unfrequently is the case) the words or principles of the two Codes are the same, I have given my readers the advantage of knowing what, by competent authority, in America has been ruled to be the Law or Practice of Courts-martial Jurisdiction.

<sup>1</sup> Chap. I. par. 18, note.

<sup>2</sup> Art. 49.

<sup>3</sup> See them printed verbatim, Vol. ii. *American Archives* (4th Series) p. 1856. In April (1775) the State of Massachusetts put forth fifty-three Articles of War, printed Vol. i. ib., p. 1350.

<sup>4</sup> These are published in 12 vols. 8vo.

## CHAPTER III.

## THE NAVAL CODE, GOVERNMENT, AND PROCEDURE.

1. THE history of the Naval Code is written in a few sentences, because it has never been made the subject of parliamentary conflict. Originally the discipline of the Navy rested in the hands of the Lord High Admiral, who, through his Court of Admiralty and the Judge presiding there, exercised Jurisdiction in respect of all Crimes and Offences committed "either upon the Sea or on the Coast, out of the body or extent of any English County, or (as the 15 Rich. II. c. 3 defined it) in great ships being and hovering in the main stream of great rivers, below the bridges of the same rivers." Such a Jurisdiction was as obnoxious to Parliament as that of the Constable's Court, and having failed of redress in the Reign of Henry VI., they secured it in that of Henry VIII. by transferring this Jurisdiction, as affecting ordinary crime, to Commissioners of Oyer and Terminer appointed as Judges of Assize under the Great Seal. Martial Law was then resorted to by the Crown for the Government of the Navy, until these Commissioners were (as we have seen) denounced in Parliament and presented to Charles I. as a grievance by the Petition of Right. Later in the same reign, and after the necessity of "Martial Law" for the Government of the Army<sup>1</sup> had been admitted by Parliament, a similar Ordinance was passed in 1645 for the Navy.<sup>2</sup> At a later period, "the Generals at Sea" (for such was the adjunct to the title of Admiral) sent forth by the Commonwealth of England issued instructions, dated the 16th of December, 1653 (which are still extant),<sup>3</sup> directing the Commanders of each

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<sup>1</sup> Chap. VII. par. 3, *post*.

<sup>2</sup> 4 Com. Jour., pp. 89-110 and 118.

<sup>3</sup> Printed *in extenso* in Mr. Thring's Work.

Squadron to form a "Council of War" for the trial of offences against the "Articles of War and Ordinances of the Sea," but reserving the execution of all sentences affecting life or limb, or cashiering of officers, until they had been confirmed by the Generals.

2. At the Restoration, the principal Ordinances then in use in the Navy were collected and issued as "the Duke of York's fighting instructions,"<sup>1</sup> and the sanction of Parliament having been given to them by 13 Car. II. c. 9, they remained in force without amendment for eighty years and upwards.<sup>2</sup>

3. After the Revolution, Parliament secured a far larger

<sup>1</sup> Admiralty Orders in Council, 1856, p. 3 (*note*).

<sup>2</sup> "Offences against the discipline of the Navy (wrote Lord Thurlow, when Attorney-General), were punished in former times according to the order of the King in Council, and even of the Admiral of England. They were so in fact, but the declaration which had been made in the former reign against Martial Law, occasioned that authority to receive the sanction of Parliament by the Act of 13 Car. II. c. 9. That Act was a general collection of the ordinances in use before. It sometimes expressly refers to the usage of the Navy, and in the execution of it that usage must be frequently applied and properly to doubtful phrases. Soon after the Act passed, the Duke of York published rules and orders which many of them directed, the execution of that law, and the Orders in Council of the 7th January, 1730 (amongst other things), presented the manner of holding and proceeding in Courts-martial. The 22 Geo. II. c. 33, though it proceeds upon recital that the former laws were not sufficiently clear, expedient, and consistent, seems to have improved but little upon them."\*

The Regulations of 1731 contain ten paragraphs in relation to Courts-martial, providing (1) That these Courts should be held in the forenoon in the most public place of the ship, and all captains of ships in company should assist thereat (par. 3). (2) That all complaints should be made in writing, setting forth the facts, with the place, the time, and the manner of commission; but that no captain personally concerned in the matter to be tried, should be admitted to sit at the trial (par. 4). (3) That the Judge-Advocate should examine the witnesses upon oath, take down their depositions, and send the same with the charge or accusation to the prisoner, for the preparation of his defence (par. 5). (4) That the Judge-Advocate should attend the Court to record the proceedings—advise on the proper forms, and deliver his opinion in any doubts arising during the trial (par. 6). (5) That the President should frame and put the questions, and the majority of voters should decide these, the youngest captain first voting (par. 7). (6) That the sentence should be drawn up in writing by the Judge-Advocate, and signed by all the members, and then all persons being readmitted to the Court, the Judge-Advocate, by the direction of the President, should pronounce the same (par. 8). (7) All capital sentences should be executed in

\* Vol. I. Ad. Opin. p. 16~9.

control over the affairs of the Navy than of the Army. This was mainly effected by the 2 W. & M. (Sess. 2) c. 2, which conferred upon Commissioners appointed by the Crown for managing the affairs of the Navy "all authorities, jurisdictions and powers which by any Act of Parliament or otherwise had been and were lawfully vested, settled, and placed in the Lord High Admiral of England."<sup>1</sup> As resulting from this enactment, all appointments and promotions in the Royal Navy are made not by the Crown direct, but through the channel of the First and other Lords of the Admiralty, while, as incident to command, all matters of discipline, as Court-martial Warrants and Proceedings, originate from and are confirmed by the Admiralty Commissioners when such confirmation is necessary.

4. The government of the Navy rests, therefore, so far as the Lords Commissioners of the Admiralty exercise power, upon statutory authority, supplemented in matters of detail by Orders in Council; and the manner of holding and of proceeding in Naval Courts-martial was so regulated by Order of the 7th<sup>2</sup> January, 1730. After the peace of Aix-la-Chapelle, to remedy<sup>3</sup>

public (par. 9). (8) That the Judge-Advocate should always send the original charge and affidavits, with the subsequent minutes of the Court, to the Secretary to the Admiralty (par. 10).

In the same Order "The rules of discipline and good government to be obtained on board His Majesty's ships of war" are contained in seven paragraphs. They are styled 'Articles of War,' and were to be read to each ship's company once a month (par. 7). They assume the right of summarily punishing the men to exist in the officers; but limit the power to a captain (par. 6), and its exercise "to twelve lashes upon the bare back, with a cat of nine tails, according to the ancient practice of the sea" (par. 4). The officers are enjoined to shew a good example (par. 1), to have Divine Services performed twice a day, with a sermon preached on Sundays (par. 2), to punish profaneness (par. 3), but not to punish an officer, only to suspend him for trial by Court-martial (par. 5). Although this Order in Council recited, and was passed to carry out the 13 Car. II. c. 9, it was never altered (even by the substitution of the 22 Geo. II. c. 33), but continued to be issued by the Admiralty in many (13) successive editions until repealed by the Order in Council of the 25th January, 1806, which enlarged the "Courts-martial" and "Discipline" into sixteen paragraphs for the first, and forty-seven paragraphs for the order subject. The later editions of Admiralty Regulations are 1808, 1813, 1815, 1824, 1825-6, 1833 and 1844.

<sup>1</sup> As to these, see Nicholas' 'History of the Royal Navy,' and 'Report on the Admiralty, 1861.'

<sup>2</sup> Lord Thurlow's opinion on Lord Howe's Letter of 1777. Vol. i. (A. R.) pp. 168-9 quoted *ante*.

<sup>3</sup> Black. Comm. vol. i. p. 420, and 14 Parl. Hist. pp. 419-25.

some defects which were of fatal consequence in conducting the preceding war, Articles of War, remodelled and altered were incorporated in and enacted by the 22 Geo. II. c. 2 which Act continued in force (with comparatively few amendments) for upwards of a century, until repealed by the 23 & 24 Vic. c. 123. The Code at present in force is "The Naval Discipline Act, 1866," and those Regulations and Instructions which are established by Her Majesty's Orders in Council of the 6th of August, 1861, and of later dates published by the Admiralty on the 1st of March, 1868.

5. Under this Code the discipline of the Navy<sup>2</sup> is maintained (1st) by general Courts-martial<sup>3</sup> for the punishment of officers and for the severer punishments of the men, and (2ndly) by the summary punishment of the men by the "officer in command of the ship." The Courts-martial, with power to try and punish any offence made triable under the Act, have exclusive jurisdiction over all the offences of officers and the capital offences of the men, and the "officer in command of the ship" has power to punish (subject to limits prescribed in the Act and the Admiralty Regulations) any other offence triable under the Act. As a very large proportion of the disciplinary are all summary punishments, Courts-martial are seldom resorted to in the Navy—though, when resorted to, the method of procedure in Naval is closely analogous to that in Military<sup>4</sup> Courts-martial; indeed the law and practice of both are the same, except so far as the Statute Law and Regulations may have varied the Jurisdiction or methods of procedure in either of them. The variations I shall endeavour to point out, first by noticing up to the text the distinguishing characteristics of Naval Courts-martial in their authority and jurisdiction, and afterwards I refer in the footnotes when treating of the Military Courts to the Statutes and Regulations which govern the procedure of Naval Courts.

6. The Government of the Navy is, as I have before noticed, entrusted to the Admiralty, and all Judicial authority for the trial of Naval offences is supposed to emanate from that Board.

<sup>1</sup> 29 & 30 Vic. c. 109.

<sup>2</sup> See, 56.

<sup>3</sup> The manner in which this Court shall be constituted is laid down in Sec. 5.

<sup>4</sup> Steph. Comm. bk. 4, part i. ch. viii.

"Any Officer on full pay" may be authorised under Admiralty Commission to order Courts-martial, though this authority always flows upwards through him to his superior officer (though uncommissioned for this purpose) whenever the latter is present at the place where such Court-martial is to be held.<sup>1</sup> In like manner this power, on the death or absence of such Commissioned Officer, devolves on the next senior, who (though uncommissioned to do so) may summon the Court.<sup>2</sup> An authority derivative from the Admiralty Commission may be conferred by any Officer holding it and commanding a Fleet in Foreign Parts, whenever he shall (a) detach any, or (b) separate himself from any part of the Fleet; the Commanding Officer of the detachment in the first case (a), and the Senior Officer of the division left on the Station in the other (b) being the Officers designated to convene Courts-martial. The Officer ordering the Court may not sit thereon, but the President should be named by him or under his authority.<sup>3</sup>

7. The legitimate purpose of the Admiralty Court in former days was, and of the Naval Court in the present time is, the discipline and, if need be, the punishment of mariners upon the open sea, when no other tribunal save that within the Ship can exercise Jurisdiction over these offenders. A Naval Court can therefore only be held under two conditions: First, That three ships at least of Her Majesty's Navy, commanded by Captains, Commanders, or Lieutenants on full pay, be together at the time when the Court is held;<sup>4</sup> and, secondly, that the place of its procedure be on board one of Her Majesty's Ships of War,<sup>5</sup> adjourning, if the Court should see fit, from one to another Ship.<sup>6</sup>

8. The Jurisdiction over persons is extended<sup>7</sup> to,—

(1.) Every person in or belonging to Her Majesty's Navy, and borne on the Books of one of Her Majesty's ships in Commission—a definition which is made to include, by Sec. 6 of

<sup>1</sup> Sec. 58 (9 and 10).

<sup>2</sup> *Ib.* (11).

<sup>3</sup> *Ib.* (13 and 14).

<sup>4</sup> Sec. 58 (3).

<sup>5</sup> Sec. 59.

<sup>6</sup> Vol. iv. *Ad. Opin.* p. 310.

<sup>7</sup> Sec. 87. The Masters and Seamen of ships under Convoy, or used as transports are—to a limited extent only—under the Act. Secs. 31 and 90.



Marine Mutiny Act, the Royal Marines, and, by the 8th of the 19 & 20 Vic. c. 83, the Coast Guard, when borne on the Ship's Books or on board any Ship in Commission ;—

(2.) Her Majesty's Land Forces,<sup>1</sup> to such an extent only as is laid down by Order in Council, that dated the 22nd of February, 1870, being the one at present in operation ;<sup>2</sup>—

(3.) Passengers on board, to the extent laid down in the Admiralty Regulations, of which par. 70 of chap. xii. (1862) contains the provisions in force ;—

(4.) All spies from the enemy.<sup>3</sup>

9. As against the Officers and Crew thereof, any Ship that is wrecked, lost, destroyed, or taken by the enemy, shall, for the purposes of the Act, be deemed to remain in command until they are removed into some other Ship of War, or until a Court-martial shall have been held—a provision necessary to remedy a legal difficulty existing under the earlier Law, for the loss of the Ship released the Officers and Men from all responsibility<sup>4</sup> to the Naval Courts until the Court of Enquiry had been held as to cause of the loss, and during that interval all discipline was relaxed.

10. The Jurisdiction as to the nature of the offences is, from the circumstances of a ship's position at sea, more extensive than that which is given to Military Courts-martial. Besides for Murder,<sup>5</sup> Robbery,<sup>6</sup> and other offences usually cognizable before Courts of ordinary Criminal Jurisdiction, authority is given to punish for any other criminal offence, whether committed in or out of England under the Act, as for an offence committed to the prejudice of good order and discipline not otherwise specified, or to award punishment equal to that which would be awarded by any ordinary Criminal Tribunal.<sup>7</sup> For all offences other than such as are punishable by death or penal

<sup>1</sup> The relative rank of the officers of the Navy and Army was first settled by Order in Council of 10th February, 1747, and now is determined by Admiralty Regulations (1862), p. 45. No Naval Officer is to assume to command the Army on shore, nor Army Officer is to assume the command of any of Her Majesty's ships, or officers or men, unless under special authority from the Government in London, for any particular service.

<sup>2</sup> App. II. *post.*

<sup>3</sup> Sec. 6.

<sup>4</sup> Vol. ii. Ad. Opin. 19 and 256. Vol. iii. ib., p. 618.

<sup>5</sup> Death by violation of neutrality, to be tried by Court-martial (as murder). Vol. ii. Ad. Opin. p. 186.

<sup>6</sup> Vol. ii. Ad. Opin. p. 346.

<sup>7</sup> Sec. 45.

servitude, the proceedings and penalties are to be "according to the Laws and Customs in such cases used at Sea."<sup>1</sup>

11. The Jurisdiction is therefore essentially local as to the place at which the trial must be held, and not less so where the offence must have been committed.<sup>2</sup> This, for ordinary offences, is, (a) anywhere within the Jurisdiction of the Admiralty; (b) in Harbour, Haven, or Creek, on Lake or River; (c) on shore out of the United Kingdom; or (d) in Her Majesty's Dock and other Yards, Wharves, Arsenals, Barracks, or Hospitals in the United Kingdom; or, for specified offences against discipline, any place on shore<sup>3</sup>—a provision which was intended to prevent what formerly went unpunished, viz., personal insult by a subordinate to his Superior Officer<sup>4</sup> on shore.

12. As to the sittings of the Naval Court, the earlier Law required them to be continued from day to day until the sentence was given; and where an adjournment had been made (at the request of the prisoner, and to enable him to prepare his defence) from Monday till Wednesday, the sentence was held to be void, because the adjournment was illegal.<sup>5</sup> The words of the present Law<sup>6</sup> are directory—not compulsory; in other words, that the sitting from day to day is not (as before) a condition precedent to their power of passing sentence, but a direction to be carefully observed by the members of the Court, non-compliance with which (unless for just cause) would properly render the defaulting members liable to serious punishment.<sup>7</sup>

13. The Admiralty has the power conferred by Statute of making General Orders (to be confirmed by the Queen in Council) for altering or regulating the procedure and practice of these Naval Courts; and the original proceedings of every Court, or an authorised copy thereof, must be sent with as much expedition as possible to the Secretary of the Admiralty by the Commanding Officer or Senior Officer on the Station.

<sup>1</sup> See Sec. 44, and Vol. i. Ad. Opin. p. 263; ib., pp. 170 and 235.

<sup>2</sup> Vol. ii. Ad. Opin. p. 441.

<sup>3</sup> Sec. 46.

<sup>4</sup> Vol. i. Ad. Opin. p. 354, and Vol. ii. pp. 125 and 142.

<sup>5</sup> 1828, Vol. ii. p. 431.

<sup>6</sup> Sec. 68.

<sup>7</sup> Vol. iv. Ad. Opin. p. 375.

14. But the great distinction between the Naval and Military Courts is in the power which the former possesses in most cases of ordering the immediate execution of its sentence upon the prisoner without any confirmation by the Commanding Officer,<sup>1</sup> the only exception being Capital Punishment (other than for Mutiny) which must be previously confirmed by the Admiralty or the Commanding Officer on a Foreign Station. This immediate infliction of Capital Punishment for Mutiny must rest with the Court, and it would appear to be doubtful whether the Admiralty could (even if so minded) give any previous direction to the Court so as to interfere with its discretion.<sup>3</sup> If the sentence of death be awarded, but no order is given for its execution, then the Admiralty must be appealed to for their directions.<sup>4</sup>

15. Over all punishments (save capital ones, which cannot be remitted by the Crown) the Admiralty<sup>5</sup> may exercise a controlling power. Any sentence may be suspended, annulled or modified, or an inferior punishment may be substituted, or it may be remitted; and yet the sentence so modified shall remain valid, and carried into execution as if it had been originally passed with such modification by the Court Martial, provided the punishment be not increased by such modification.

<sup>1</sup> Ad. Reg. pp. 101-2.      <sup>2</sup> Sec. 53 (3).      <sup>3</sup> Vol. ii. Ad. Opin. pp. 122, 351.

<sup>4</sup> Vol. i. *ib.* p. 317.

<sup>5</sup> Sec. 58.

## CHAPTER IV.

## MILITARY GOVERNMENT.

1. To facilitate the reader in his study of the Military Code, it may be convenient that some brief description should be given of the Military Government and Army Organization from time to time existing in the Kingdom, not going beyond the reign of Charles II.—nor that Statute in his reign<sup>1</sup> which “declared the sole supreme government, command and disposition of the Militia, and of all forces by sea and land, and of all forts and places of strength to be the undoubted right of the Kings and Queens of England.” Dealing with the Army alone in this Chapter, the government of the Militia and other auxiliary forces will be left for separate consideration.

2. As the Army existing at the Restoration of Charles II. had been raised by the Commonwealth and commissioned by the Speaker,<sup>2</sup> the necessity which existed for asserting, by the Statute recently quoted, the supremacy of the Crown over these forces, is apparent. To disband all the Regiments would have been practically impossible: besides, a “Guard to the Sovereign” was lawful,<sup>3</sup> and the maintenance of the “Garrisons” essential for the public safety. Authority was therefore given to the King by the 12 Car. II. c. 15, to continue the Army on foot to this extent—1st, by re-establishing the “Garrisons” in the same condition in which they stood in 1637, and then (out of the residue of Soldiers) by forming a “Guard” for the person of the sovereign. It was under the title and military organization of “Guards and Garrisons” that the Home Army

<sup>1</sup> Vol. I. p. 34.<sup>2</sup> Vol. II. p. 65.<sup>3</sup> See Note on this, Vol. I. p. 365.

was annually voted by Parliament till the commencement of the present century.<sup>1</sup>

3. These Garrisons appear to have been twenty-five in number.<sup>2</sup> The Officers and men were commissioned—or appointed for life—to each Garrison specifically,<sup>3</sup> and varied in numbers according to the importance of the place to which they were commissioned. Every Garrison—whether a fort or a fortified town—had a Governor, or Commandant, nominated by the Crown under letters patent, and holding either the fortress or his official residence in it, with all the arms and armament, under indent or indenture<sup>4</sup> from the Board of Ordnance. The staff under him would consist (1) of a Town Major and Adjutant in a large town or only of a Fort Adjutant in a fortress; (2) a Chaplain; and, lastly, a Medical Officer. The effective strength of the Garrison consisted—in addition to Garrison or Invalid Battalions—of Master<sup>5</sup> and other gunners as Warrant Officers appointed by the Ordnance Board, and of one or more Regiments of the Line, or Militia,<sup>6</sup> which in times of national danger might be commanded to serve therein by the Crown.

4. Of all the Officers and men within the Garrison the Governor held the supreme command,<sup>7</sup> and none could either enter or depart without his leave.<sup>8</sup> “When a Regiment comes near the Garrison,” wrote General Bland in 1727, “the Commanding Officer should send an Officer to acquaint the Governor . . . and desire permission for the Regiment to enter into the town, for without this precaution they will be kept without the barrier till the Officer of the Guard sends and receives the

<sup>1</sup> Vol. I. p. 53. Until 1807, the estimate for 1808 being for “Land Forces.”

<sup>2</sup> These were: (1.) Berwick; (2.) Calshot; (3.) Carlisle; (4.) Chester; (5.) Clifford's Fort; (6.) Cinque Ports; (7.) Gravesend and Tilbury; (8.) Hull and Blackhouse; (9.) Hurst Castle; (10.) Holy Island; (11.) Landguard; (12.) St. Maws; (13.) Pendennis; (14.) Plymouth; (15.) Portland Castle; (16.) Portsmouth; (17.) Southsea Castle; (18.) Sheerness; (19.) Scilly Islands; (20.) Scarborough Castle; (21.) Tinnmouth; (22.) Tower of London; (23.) Upnor; (24.) Windsor; (25.) North Yarmouth; (26.) Isle of Wight (see *Return* 1716, Vol. ii. of Com. Rep., p. 105).

<sup>3</sup> Vol. I. pp. 8, 54.      <sup>4</sup> See one relating to Berwick in 1539, Vol. I. p. 413.

<sup>5</sup> The Ordnance Stores were entrusted to this Officer, Vol. II. p. 676.

<sup>6</sup> Vol. I. p. 9.

<sup>7</sup> See the Tower Orders of 26 June, 1728, which are still in force.

<sup>8</sup> Bland's ‘Military Discipline’ (1762), p. 229.

Governor's orders for their admission :"<sup>1</sup> a precaution essential in war (and a rule which was invariably insisted upon by the Duke of Wellington during the Peninsular<sup>2</sup> War), that the Governor of the fortress or Military district may know whether the troops approaching and seeking entrance are to be received as friends or enemies. It became the duty of the Town or Fort Major or Adjutant, as the Officer appointed to aid the Governor in the enforcement of Military discipline after the Regiment had been admitted, to "read the general orders of the Garrison to the Officers and Soldiers, that they might not offend through ignorance"—which duty he was to discharge "in a loud voice in the centre of the Regiment in square, then giving an extract or copy of the orders to the Major that each other Officer might have a copy."<sup>3</sup> The solemnity with which the gates of the Fortress or Garrison were closed at night may be seen from an extract given at the foot from the present Garrison Orders of the Tower of London.<sup>4</sup>

5. As to the Guards, their history has been given by another writer,<sup>5</sup> and a note on "the Guard to the Sovereign" will be found elsewhere.<sup>6</sup> It will be sufficient here to observe, that the Regiments sanctioned by the Restoration Parliament were formed, and have since been continued on the Army Establishment. The discipline of each devolved solely on the Colonel with an adjutant—as an executive officer to assist him ; subordinate authority was exercised by each Captain over his Company, and supreme authority over the several Colonels

<sup>1</sup> Ed. 1762, p. 178.

<sup>2</sup> G. O. of 20 Aug. 1810 and 17 May 1813.

<sup>3</sup> Pages 180, 181.

<sup>4</sup> *Extract from Standing Orders of the Tower of London, November 1853.*

II. Main Guard. (8.) When the Gates are closed, the following ceremony takes place: Five minutes before the hour of closing the Gates, the Yeoman Porter applies to the Sergeant of the Main Guard for the Escort of the Queen's Keys. The Sergeant acquaints the Officer that the Escort is called for, who furnishes without delay a Sergeant and six Men for this duty, at the same time placing his Guard under Arms. When the Keys return, the Sentry challenges, "Who comes there?" The Yeoman Porter answers, "The Keys." The Sentry calls, "Whose Keys?" And the answer being given, "Queen Victoria's Keys." the Officer of the Guard gives the command to "Present Arms." The Yeoman Porter then says, in an audible voice, "God preserve Queen Victoria!" and the whole Guard answers, "Amen." The Officer turns in his Guard, and the Keys are carried to the Governor by the Yeoman Porter.

<sup>5</sup> Col. Mackinnon.

<sup>6</sup> Vol. I. p. 363.

by the Sovereign, who, until the year 1830,<sup>1</sup> exercised a personal command and supervision over these Regiments. While, however, they were quartered in the Tower of London the Constable exercised the supreme command over them in all—other than Regimental—matters.

6. The Guards and Garrisons thus sanctioned by Parliament were paid for by the Crown, and governed under the Royal Prerogative. The supreme command was exercised by the Sovereign personally, even so recently as the reign of George III.<sup>2</sup> The Disciplinary Officers upon the King's Staff were the "Adjutant General"<sup>3</sup> and the "Advocate General,"<sup>4</sup> and the administrative Officer was the Secretary at War.<sup>5</sup> For the better ordering and government of these Troops, Articles of War or Military Orders were put forth by Charles II. in March, 1662-3, framed, as it would appear from their text, by the advice of General Monck, then Duke of Albemarle. Of the contents of these Articles full mention has already been made.

7. The Army was twice augmented during the reign of Charles II., against the wishes of the people as represented in Parliament.<sup>6</sup> The Regiments raised had of necessity to be either billeted on the people or encamped in the open; but in either position more stringent regulations or Articles of War were deemed needful for their government. Hence, upon these augmentations, other Articles of War which have been also referred to, were put forth by the Duke of Albemarle in 1666, and by Prince Rupert in 1672, for the government of Regiments serving more under the command of Generals on the Staff than of Governors of Garrisons.

8. These augmentations (while they lasted) necessarily altered the Military organization or government previously adverted to. In Camps or districts (other than Garrisons) the General-in-Chief held the supreme command; and upon his staff, for all disciplinary matters, he had an Adjutant General,<sup>7</sup> a Judge Advocate,<sup>8</sup> and a Provost Marshal. The discipline of each Regiment, as when in Garrison, was controlled by the

<sup>1</sup> Vol. I. p. 365.

<sup>2</sup> Vol. II. p. 256.

<sup>3</sup> Vol. II. pp. 256-340.

<sup>4</sup> Vol. I. p. 77; Vol. II. p. 359.

<sup>5</sup> Vol. I. p. 71, and Vol. II. p. 222.

<sup>6</sup> Vol. I. Chaps. III. and IV.

<sup>7</sup> Vol. II. pp. 256, 264, 340.

<sup>8</sup> Vol. I. p. 77, and Vol. II. p. 359.

Colonel—who in aid thereof had on his Staff an Adjutant and Provost. Detached or independent companies, not regimented, also existed, each under a Captain. The Articles of 1666 and 1672, which had reference to this altered organization, remained in force so long only, during Charles II.'s reign, as the Army continued on foot.

9. As the reign of James II. commenced with the Rebellion of Monmouth,<sup>1</sup> the Army had to be employed against the Rebels in the field. Articles of War were therefore put forth for the government of the King's Forces during that Rebellion, and into these were introduced powers for the destruction of property belonging to rebels on the order of the General in Command, which continue in the present Code.<sup>2</sup> During the Rebellion, these Articles were applied to the Civil population; but the Secretary of War directed Colonel Kirke no longer so to use them after the Rebellion had ceased.<sup>3</sup> Court-martial proceedings against Soldiers are still extant—trying and condemning them for quasi-political offences.<sup>4</sup> Afterwards, in the year 1686, James II. issued other Articles of War for the government of the Land Forces, which, with his directions with regard to "Military Discipline," already printed, furnish a complete record of Military Law as it existed at the time when the first Mutiny Act was passed.

10. The Army of the Stuarts was (as it has been already noticed) wholly that of the Sovereign. Not only were the officers and men commissioned and raised under Royal authority, but their rights and authority were ignored by Parliament. Claiming exemption from legal process,<sup>5</sup> and living often at free quarters, though nominally maintained by the Crown out of the King's personal revenues,<sup>6</sup> Parliament and the country were heartily glad whenever the King was pleased to dismiss or disband<sup>7</sup> them. Against the Sovereign they had no legal redress even for their pay<sup>8</sup> when in—nor for their summary dismissal from—his service.<sup>9</sup> In this respect what the Law was then has remained the Law since; though, as will be presently seen, the Army cannot now be raised without the sanction

<sup>1</sup> Vol. I. p. 79.    <sup>2</sup> Art. of War, 103.    <sup>3</sup> Letter of July 1685, Vol. I. p. 478.

<sup>4</sup> *Ib.*, p. 475.    <sup>5</sup> Vol. I. p. 207.    <sup>6</sup> *Ib.*, p. 17.    <sup>7</sup> Vol. I. Chaps. III. and IV.

<sup>8</sup> Vol. I. p. 98.

<sup>9</sup> Vol. II. pp. 118-123.



of Parliament, nor paid without a special vote made to the Sovereign for its maintenance and support.

11. The conditions imposed by Parliament upon the Crown when William III. ascended the throne, so far as the Army was concerned, were these<sup>1</sup>:—"That within the Kingdom in time of peace the King should neither raise nor keep an Army without the consent of Parliament; (2) That no person born out of the three kingdoms, or our National dominions, except such as are of English parents, should command as an Officer therein."<sup>2</sup> Subsequently the Parliamentary Supplies were divided into "Public" and "Personal," with specific votes to the Crown for the payment of the Army out of the "Public" revenue.<sup>3</sup> Though in all other respects the Powers of the Crown remained the same; the Army became National rather than Royal, because its Establishment was sanctioned, its pay provided,<sup>4</sup> and lastly (as we have seen) its discipline enforced, by Parliament.<sup>5</sup>

12. But the Army was, as we have already noticed, governed under a severer Code made by Parliament than that made by the Crown under Prerogative authority. The Mutiny Act, without displacing the Articles of War and those Military Tribunals under which the Army had hitherto been governed, gave statutory sanction to the infliction of Capital Punishments for offences rather Political than Military, and which had rarely been so punished. The officers, of the different garrisons exercising Judicial functions under Statutory powers, used these so unsparingly,<sup>6</sup> that when William III. was securely seated on the throne it became necessary for him to control their proceedings, by ordering the Articles of War<sup>7</sup> to be sent up to the King at Head Quarters for Revision, and often to exercise the Prerogative of Mercy by pardoning Soldiers condemned to death for purely Military offences.

13. During the last century, the Army, *i.e.* in all regiments save the Guards, was dispersed into different parts of the country on Billet under the Personal Government of the King, aided as theretofore by the Adjutant and Advocate Generals on

<sup>1</sup> Vol. I. p. 86.    <sup>2</sup> *Ib.*, p. 90.    <sup>3</sup> Vol. I. pp. 25, 66, 110.    <sup>4</sup> Vol. I. p. 93.

<sup>5</sup> *Ib.*, p. 142.

<sup>6</sup> Vol. II. p. 41.

<sup>7</sup> Vol. I. p. 503.

is Staff. These Regiments and independent Companies were mustered first every two, and afterwards every *six* months<sup>1</sup> by Muster Masters, commissioned by the King, and to assure him of their efficiency as Soldiers, a General Officer<sup>2</sup> was annually, or oftener, sent down to review and report upon them. As each Colonel had his own Standing Orders (no General Regulations being in existence) for the discipline and exercise of the Regiment, there was not any Standard of uniformity or of efficiency by which progress in the Military art could be tested.<sup>3</sup>

14. This in outline was the Military Government and organization which (as distinguished from the Militia Government and organization) existed in Great Britain until the close of that century; the first French Revolutionary War in 1792-3, however, obliged Mr. Pitt to increase the Army from 18,000 to 60,000, and to establish a far more extensive organization. For this object, a staff of Military Officers was permanently established in London, with a General Officer (Lord Amherst) appointed as Commander-in-Chief of the Army. Great Britain was shortly afterwards divided into Military districts, to each of which a General Officer was appointed to command those Regiments of the Army, other than such as were quartered in the "Garrisons." Each General had an Adjutant upon his Staff, and was subordinate to and in correspondence with the Commander-in-Chief at the Horse Guards. Thus, under this organization it became possible to secure uniformity of discipline; and, therefore, in 1804 General Regulations were put forth by the Adjutant-General with the King's authority, for the guidance of the Army, which each General was ordered to see uniformly obeyed in his District.<sup>4</sup>

<sup>1</sup> See 1st Art. of War, 1872.

<sup>2</sup> Vol. II. p. 257.

<sup>3</sup> A volume was issued from the War Office on 1st January, 1788, printed by J. Walter, Charing Cross, as "A Collection of Regulations and Orders," under Mr. Burke's Pay Office Act, "subsequent to 24 December, 1783," to which prior regulations were added. These were divided under two heads, of "Discipline" and "Accounts," and are, so far as I know, the first authoritative issue of regulations extant. The War Office Regulations were collected and issued in April 1807, and the Horse Guards in August 1811.

<sup>4</sup> As to the state of the Army before and after 1792, see Vol. II. p. 355. As to the appointment of the Commander-in-Chief and the history of his office, *ib.* p. 335. As to the barrack accommodation, Vol. I. p. 240; and as to the increase of the Army, *ib.* p. 259.

15. In course of time the Military organization of the District and the General gradually superseded that of the Garrison and the Governor, until in the year 1833 the latter, with the exception of the Tower Garrison and Constable, were altogether abolished. After this change the principle of Military Authority remained the same as theretofore, for the District was as much under the command of the General as the Garrison was under that of the Governor. The General's authority was supreme in his District: no one could enter without his leave, nor continue in it without obeying his Standing Orders for the Government of all Military forces therein.

16. But these territorial arrangements were not intended to interfere with the Organization of the Army in divisions, brigades, or regiments,<sup>1</sup> as these existed in districts; or with the individual authority and responsibility of the Commanding Officers; for—over the company, the Captain—over the Regiment, the Colonel<sup>2</sup>—over the Colonel, the District General—and over the District-General, the Commander-in-Chief was and is supreme. The rule of the Service is no doubt that the men should be led by their own Officers,<sup>3</sup> and hence the etiquette that the orders of the Superior Officer should be given to and carried out by the agency of all the Officers subordinate to him,<sup>4</sup> according to their respective duties; but the power and responsibility of the Superior Officer, *i.e.* the Senior Officer of the highest rank present, is always supreme.<sup>5</sup> It

<sup>1</sup> Under the General Order of April 1873, a composite organization appears to have been initiated. Each Military District is divided into sixty-six Infantry, and twelve Artillery sub-districts. To each Infantry sub-district, two battalions of Infantry linked together (though one is at home, and one on foreign service) are attached. Within the sub-district, a Brigade depot (composed of two companies from each Line battalion) is to be located, under the command of a Lieutenant-Colonel appointed to the sub-district, assisted by the Major of the home battalion, and the officers and non-commissioned officers of the four companies.

<sup>2</sup> See the Duke's despatches of 1813, to Colonel Rooke, enforcing this principle (Vol. xiv. Supp. Desp., 184), and his S. O., 16th March 1812, ordering the Colonel into arrest for allowing straggling on the march; and S. O. of 11th December 1812, for allowing the men to take forage.

<sup>3</sup> See this affirmed as to the Militia and Volunteers by Sec. 111 of 42 Geo. III. c. 90; and sec. 9 of 26 & 27 Vic. c. 65.

<sup>4</sup> As to the personal execution of orders by a Superior or their delegation to an Inferior, see Vol. vii. Gur. Desp., p. 232.

<sup>5</sup> "It must be understood," wrote the Duke of Wellington, "that the position of

must, however, be understood that though each of these several commanding Officers is supreme only in the absence of his superior, yet that his orders (not, of course, being inconsistent with those of his Superior) are to be implicitly obeyed. So here the Captain reports to the Colonel, or the Colonel to the District General, or the General to the Commander-in-Chief, or the Commander-in-Chief to the Minister of the Crown,<sup>1</sup> (to whom these Officers are responsible), the order or act of the subordinate Officer approved or adopted by—becomes in fact the order or act of—the Superior Officer (the chain of subordination and of responsibility being preserved throughout the Army) or of the State.<sup>2</sup>

17. Such is the Military Government and organization now existing, and it only remains for me to add that, in support of this authority over the Army, each of these Military Hierarchs or Magistrates, above the rank of Captain, has jurisdiction given him by Royal Warrant or the Mutiny Act, to establish a Court of Military Officers who are themselves subject to the Mutiny Act, for the Punishment of Military Crime committed by those under his Command. Thus, for the ordinary crimes of a Soldier, committed against the discipline of his Regiment, the Colonel (as responsible for it) can summon his "Regimental"<sup>3</sup> Court. For graver offences—committed in the District, and beyond the authority of the Colonel—the General can summon his "District" Court; and for the highest military offences—which are to be brought under the cognizance of the Commander-in-Chief—the "General" Court is summoned by authority.

18. As in the Civil Administration of Justice, Courts of Petty Sessions for small offences; of Quarter Sessions for

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is attended by the necessity for the performance of duty, and for attention to maintenance of good order and discipline. It is not in the power of an officer to lay aside or assume his rank in the Service at his pleasure, but most particularly not when he is on a parade upon which troops are formed for duty."—*ibid.* of 17 Sept. 1813, Vol. vii. Gur. Desp., p. 7. Even at the Mess (Hough, *ibid.*, pp. 650-664.

Grant v. Gould, *supra*.

<sup>2</sup> See the subject discussed in Vol. II. p. 148. When parts of Regiments are "detached," a "Detachment," with the same officers as a "Regimental," Court is summoned. See Art. 113 of 1872.

graver ones; and of Oyer and Terminer for crimes, have been established with separate and defined authority: so in the Military Administration of Justice, regard is to be had to the several Courts-martial, as Regimental, District or General, which are held under the Mutiny Act.

19. These Courts are not, however, permanent,<sup>1</sup> but created "*pro hac vice*," *i. e.* for the trial of the particular offender; but continuing until their adjudication upon his case has been finally disposed of by the Military Hierarchy convening the Court. The Officers summoned to attend as Judges, do so as part of their Military duty; and for absence or neglect, they are liable to be punished themselves by a General Court.<sup>2</sup>

20. The General Court,<sup>3</sup> which until the 3rd Geo. I. c. 2,<sup>4</sup> the General could summon without authority from the Crown, now constituted by Royal Warrant granted under the countersign of a Secretary of State, and the authority of the 6th Section of the Mutiny Act. An annual delegation is given to the Commander-in-Chief and other General Officers, which empowers the Officer holding the Warrant to assemble from time to time in the United Kingdom, as occasion may require General Courts for the trial of any *Officer or Soldier* under his Command, charged with any offence against the rules of Military Discipline, and committed either before or after he undertook the Command. The Warrant further directs that the Court is to be constituted, and to proceed in the trial of such charges, and in giving Sentence and awarding Punishment, according to the rules prescribed in the Act and Articles, and then orders that the Proceedings of each Court shall be sent to the Judge Advocate General, that he may lay the same before the Sovereign, and afterwards send them to the Commander-in-Chief for the decision of the Sovereign thereon.

21. The "District" Court, which was first authorized by

<sup>1</sup> Brooks v. Graham, 11 Pick. Rep. 445.

<sup>2</sup> See Appendix D.

<sup>3</sup> As to this Court in the Navy, see Chap. III. pars. 5 and 6.

<sup>4</sup> Compare with 1 Geo. I. s. 2, c. 34.

<sup>5</sup> The Warrant to General Officers abroad gives plenary powers, and a power of delegation to other Officers.

Mutiny Act of 1829,<sup>1</sup> is constituted under a like authority. The Warrant authorises the General of the District to assemble "District" Courts for the trial and punishment of any *Soldier* belonging to the forces under his Command, who is charged with Mutiny or Desertion, or with any offences mentioned in the Act and Articles, as liable to be tried by such Courts, or with any other misdemeanour or misbehaviour contrary to the rules of Military Discipline. Here again, the Warrant directs that the Court is to be constituted, and to proceed in the trial of offenders, and in giving sentence—and awarding punishment (not extending to death or penal servitude), according to the powers and directions contained in the Act and Articles. The proceedings go, as of course, to the "District" General, and the Warrant authorises him (or in his absence, the Officer in acting Command) to confirm and put the Sentence in execution, or to suspend, mitigate, or remit such Sentence, as shall be best for the good of the Service.

22. The "Regimental Court"<sup>2</sup> has always been convened by the Colonel under directions conferred by the Articles of War first in 1672, and now continued,<sup>3</sup> without any special Warrant. The Commissioned Officers, on the appointment of their Colonel, or Commanding Officer, may hold "Regimental" Courts, and may inquire into such disputes and criminal matters as may come before them; but no Sentence shall be executed<sup>4</sup> until the Commanding Officer of the Regiment shall have confirmed the same.

23. Other Courts may be formed: one (first sanctioned in 1813), as the "Detachment General"<sup>5</sup> to be held under Section 12, to punish offences committed against the inhabitants, in a Foreign Country; and the other (first sanctioned in 1830) as

<sup>1</sup> In this year the number of Courts-martial rose from 384 in 1828, to 1043; of which 767 were "District" Courts, Com. Ret. 1426, 18th May 1830.

<sup>2</sup> Art. 59. The Colonel had special authority given him (prior to 1829), to hold a General Court composed of the officers of the Regiment (as a General Regimental Court-martial), of which he might be, or name the President. He could not confirm these proceedings, and no officer could be tried. Hough (1825), p. 393.

<sup>3</sup> Art. 112.

<sup>4</sup> Art. 129.

<sup>5</sup> Chap. VII. par. 40, and Chap. XI. par. 11.

the "Drum Head,"<sup>1</sup> to be held under Section 11, to punish on the spot, mutiny or insubordination committed on the line of march. These are exceptional proceedings which are within the competency of commanding Officers to adopt upon emergencies, but they are not Courts which need be here further adverted to.

24. These three—"General," "District," and "Regimental"—Courts are those under which the Army is governed, and by which the Military Law is administered. The details relating to each Court—as the number of Officers of which it should be composed, the offences which it can try, and the punishments which it can inflict—will be found set out in the Military Code, printed in the Appendix. These Courts, as divided into "General and District," on the one hand, and "Regimental" on the other, have to some extent a difference in their mode of procedure, which will be more properly explained hereafter.

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<sup>1</sup> Chap. XI. par. 12.

## CHAPTER V.

THE GOVERNMENT OF THE MILITIA AND AUXILIARY FORCES.<sup>1</sup>

1. Co-EXISTENT with the Military Government and Army Organization thus established by the Crown—but totally distinct from and as a counterpoise<sup>2</sup> to the Army—the Militia Government and organization was established by Parliament in 1660, and continued by the same authority until 1871. This constitutional organization (extending to the Volunteer and Yeomanry Forces) demands our present consideration, that the reader may understand not only the original Militia establishment, but the organic change recently made in the Government of the Auxiliary<sup>3</sup> Forces, and the altered relationship in which these forces stand towards the Crown and the Officers of the Regular Army.

2. As the constitutional history of the Militia, Yeomanry, and Volunteers, and the several statutes under which each force has been raised may be found elsewhere,<sup>4</sup> it will be sufficient for our present purpose to notice only those fundamental principles which are applicable to all of them alike:—

1st. That the Militia (and in that term the other auxiliary forces may be included) was essentially a dormant local force, raised in the county by the Lord-Lieutenant and his subordi-

<sup>1</sup> The information to which the Army was referred by General Orders, 32 of 1873, para. 83-90 of the first edition, will be found in this chapter.

<sup>2</sup> Vol. I. p. 37-8, 68, 84, 95, 104, and Vol. II. p. 60, 140, 324, and 355.

<sup>3</sup> This term was first applied to the "City Train Bands" (Vol. I. p. 35), but it is now used on the "Army Estimates" as a general term to include the forces referred to in this chapter.

<sup>4</sup> Vol. I. Chap. III. and XIV.



nate officers, and governed under permanent statute law, rather than by rules or orders made by the Crown.<sup>1</sup>

2nd. That the Commander-in-Chief of this force, in every county, was the Lord-Lieutenant, who had the appointment of officers (resident or holding property in the county) and to whom commissions were given under his sign-manual.

3rd. The specific engagement entered into with the Crown by these forces, to qualify themselves, and to act as Soldiers was:—1st. To train and exercise a given number of days in each year, in their own county, under the command and discipline of their own officers and, 2nd. To come out into embodied service, in defence of the Realm, upon national emergency, which event happening, and only then, the Crown could place them under the command of General Officers of the Regular Army, but observing these two conditions: (a) That these forces should be *led*, and (b) In case of Court-martial proceedings, be *tried* by their *own* officers.

3. Bearing these fundamental principles in mind, I propose to show here briefly how these Forces have been withdrawn from the command of the Lord-Lieutenant, and to what extent each force is—(a) Under the existing Military organization and the command of Officers of the Army, and (b) Amenable to the Jurisdiction of Courts-martial awarding punishments for Military Offences under the Mutiny Act.

4. (a.) As to Command.

By Order in Council of the 5th day of February 1872, made under the Army Regulation Act, 1871,<sup>2</sup> the command of the Militia, Yeomanry and Volunteer Forces of the United Kingdom passed from the hands of the Lord-Lieutenant<sup>3</sup> in each county, to those of the Secretary of State. The Crown is enabled to delegate this Command to any Military Officers, and the Act declared that the Commissions held by Officers of Militia, Yeomanry and Volunteers should be deemed to have been issued in the same manner as that in which Commissions in the Regular Army are issued.

<sup>1</sup> The annual Pay and Clothing Act was not passed originally for discipline, and the Crown had no statutory authority for making Militia regulations until 15 & 16 Vic. c. 50, sec. 1.

<sup>2</sup> Sec. 6.

<sup>3</sup> As to this Officer, Vol. I. pp. 32, 281; Vol. II. p. 127.

5. Under the authority granted to the Crown by the Mutiny Act, 1872, and which has been exercised by order, of 8th April 1873, each Regiment or Corps of Militia and Volunteers, has been attached to a Battalion or Regiment of the Army (located in a subdistrict or Depot Brigade), upon these conditions, *i.e.*, that the officers and men shall not be required to serve for a longer period, or in any other country, than that during and in which they may be required to serve, or be liable to any greater punishment than that to which they might be subjected if the Act and order had not been passed or made.

6. Now that the Regular Army and the Auxiliary Forces are brought into direct contact—the relative rank or authority which the officers of each branch of the Service hold together and towards each other, becomes important to notice. The Statute Law and Regulations granting this rank, are as follows:—

1st. As to the Regular Army—

The 106th Article of War gives those officers priority of authority and command, except when serving as Adjutants in Militia regiments, and then their rank in the regiment follows the rule of seniority to the date of each Officer's commission.<sup>1</sup>

2nd. As to the Militia—

The 42nd Geo. III. c. 90, sec. 2, declares their rank to be equal in degree, but junior in service to the Army.<sup>2</sup>

3rd. As to the Yeomanry—

The Act of 1804<sup>3</sup> declares their officers to be junior to the Officers of the Army and Militia, and imposes this restriction, *viz.*, that no Yeomanry Officer shall ever rank above a Field Officer of either service.

4th. As to the Volunteers—

The Act of 1863<sup>4</sup> declares their Officers to be the youngest of their respective ranks, with a prohibition against a Volunteer Officer ever exercising command over any other Forces, except as the Articles of War may from time to time prescribe.

The effect of these legal enactments appears therefore to be:—

1st. That the Majors and Captains of the Army may be commanded by the Lieutenant-Colonels and Majors of the Militia.

<sup>1</sup> 42 Geo. III. c. 9, sec. 77; but see 32 Vic. c. 13, sec. 2.

<sup>2</sup> 42 Geo. III. c. 90, sec. 2.

<sup>3</sup> 41 Geo. III. c. 54, sec. 26.

<sup>4</sup> 26 & 27 Vic. c. 65, sec. 5; 210 H. D. (3) 120.

2nd. That the Captains and Lieutenants of the Army may also be commanded by the Majors and Captains of the Yeomanry.

And that this command is exercised (not by the Articles of War), but by the Statutes regulating the Militia and Yeomanry Forces.

7. (b.) As to Court-martial Jurisdiction.

The liability to the Military Code is to be found in the several Statutes under which each Force has been raised subject to one fundamental enactment relating to all the Auxiliary Forces hitherto to be found in the Mutiny Act "That this Act or anything therein contained shall not extend or be anyways construed to extend to or concern any of the Militia Forces of this Kingdom;" words extended to the Yeomanry and Volunteer, and the Reserve Forces of 1867, with this addition in the present Mutiny Act<sup>1</sup> "Excepting only [as hereinafter enacted, or] where by any Act for regulating any of the said Forces the provisions contained in the Mutiny Act are, or shall be, specially made applicable to such Forces."<sup>2</sup>

8. The several Acts regulating these forces, each contain special provisions<sup>3</sup> (which must be noticed), applying the Mutiny Act and Articles of War, with limitations as to the period of liability and to the extent of punishment; and the Royal Warrants issued to General Officers for convening General Courts martial for the trial of the auxiliary forces direct special attention to be given to these statutes.<sup>4</sup>

9. I. The Militia. (a.) As to command.

Under the authority of 32 Vic. c. 13, and the Army Regulation Act,<sup>5</sup> 1871, Her Majesty has been pleased to place

<sup>1</sup> 1 William and Mary, c. 5, and Sec. 5 of 1872, in which the words italicized were first inserted.

<sup>2</sup> The sections here referred to are the 105 and 106, first inserted in 1867, and they enabled the Secretary of State to attach these forces to local Regiments of the Line, which were placed in subdistricts under the command of Colonels of the Regular Army.

<sup>3</sup> G. O. 32 of 1873, par. 2.

<sup>4</sup> W. O. Circular, 28th May 1872, and 8th April 1873, Auxiliary and Reserve Forces.

<sup>5</sup> These warrants and circular letters (dated November 1873) have been issued while this Work was passing through the press, par. 30, note 3, *post*.

the several Regiments and Corps of Militia, for the period of their assembly, training or exercise, and the Permanent Staff of such corps at all times, under the Command of the Officer Commanding in Chief and of the General and other Officers of the Regular Forces Commanding in the Districts and Subdistricts within which such Militia Regiments or Corps are assembled, trained, or exercised respectively, and where such Permanent Staff are stationed.

10. (b.) As to Court-martial Jurisdiction. (1.) During the Preliminary Training.

A power was taken in the Militia Act<sup>1</sup> of 1860, to train a Recruit "upon or any time after his enrolment," by way of preliminary instruction, at the Head Quarters of his Regiment, or any other convenient place for any time not exceeding 28 days, although his Regiment was not then called out for training; and the Act further provided that, during the period of preliminary instruction, the Recruit should be subject to the same Articles of War, and to the same laws in all respects, as if he were a Militia man lawfully called out for training and exercise. Under the Act of 1871,<sup>2</sup> this "period for preliminary instruction" may be extended for "not more than six months" at such place and time as the Secretary of State shall appoint.

11. The "place" at which each Recruit shall be assembled (unless specially ordered to the contrary), is fixed by the Secretary of State's order of the 8th April 1873, as the Brigade Depot named therein; but the "time" is fixed, or to be fixed under the authority of "General Regulations and Instructions" of the same date, issued by the "Adjutant-General."<sup>3</sup> Under these Regulations, the Recruit may be trained either on enrolment or immediately preceding the training of his Regiment, either by his own Officers or by Line Officers attached thereto under the Militia Act of 1869.<sup>4</sup>

12. If trained at the Brigade Depot, it will be in association with Line Recruits, under the immediate supervision of the Officer Commanding the Station; and that discipline may be maintained under these conditions, the Militia Act of 1873,<sup>5</sup>

<sup>1</sup> 23 & 24 Vic. c. 94, sec. 14.

<sup>2</sup> 34 & 35 Vic. c. 86, sec. 8.

<sup>3</sup> G. O. (32).

<sup>4</sup> 32 Vic. c. 13, sec. 2.

<sup>5</sup> 36 & 37 Vic. c. 68, sec. 3.

which was passed subsequently to the Regulations, is that—"Militia Recruits shall during the period of their training (when the Militia Battalions to which they belong are not for the time being out for training and exercise), be subject to the command of such Officers, whether of the Militia or Regular Forces, as may from time to time be appointed to serve with the Force with which such recruits are being trained, and the Officers in this section mentioned, shall be competent to sit on any Court-martial appointed for the trial of any Recruit for an offence committed by him during the period of his recruit training."

13. (2.) During the *period of training and exercise.*

"All the clauses, provisions, matters, and things contained in the Mutiny Act and Articles of War shall be in force with respect to the Militia in all cases whatsoever, but so that no punishment shall extend to life or limb."<sup>1</sup>

14. (3.) During the time that the Militia is "*drawn out and embodied.*"

Until returned again to its own county and disembodied by Her Majesty's order, the Militia shall be subject to the provisions contained in the Mutiny Act and Articles of War, and all the provisions contained therein shall be in force with respect to the Militia while embodied.<sup>2</sup>—the Militia become the Militia of the Line—governed as to interior Discipline and Regimental Economy, by the Queen's Regulations.<sup>3</sup>

15. This liability is, therefore, limited to three periods: 1st, that of preliminary training; 2nd, that of annual training and exercise; and 3rd, that of embodiment and return to the ranks. After these periods have expired, the power of Military Law over these Officers and Men ceases, unless it can be supported under one or other of two subsequent Statutes. The first of these—the 55 Geo. III. c. 168—enables a General or Field Marshal to sit on a Court-martial<sup>4</sup> (consisting of Militia<sup>5</sup> Officers) to try off

<sup>1</sup> 42 Geo. III. c. 90, sec. 89.

<sup>2</sup> 42 Geo. III. c. 90, sec. 111; *Reg. v. Jessop*, 1 Den. C. C. p. 619.

<sup>3</sup> *Dickson v. Combermere*, 3 Fos. and Fin. p. 543.

<sup>4</sup> An Opinion has been recently given that District Courts have authority to try these Forces, but the warrant only extends to general courts.

<sup>5</sup> As to this, Mr. Justice Story's Judgment in *Martin v. Mott*, 12 Wheat. p. 35, and Maltby on Courts-martial, p. 57.

committed during either of the two periods if the charges are delivered and made out within six months after the training or disembodiment; and the second—56 Geo. III. c. 64, sec. 5—enables Deserters to be punished at any time, though no such charges have been delivered.

16. (4.) As to Volunteers attached to Line Regiments.

During the time that any Militia volunteer is “attached for a time for the purpose of instruction to any Regiment of Her Majesty’s Forces or Permanent Staff of Militia, he shall for such time be deemed to be under the operation of the Mutiny Act, and under the command of the Officer commanding such Regiment or Permanent Staff of Militia.”<sup>1</sup>

17. (5.) The Permanent Staff of the Militia.

“Shall be at all times subject to the Mutiny Act and Articles of War,” and it shall be lawful for the Colonel of the Regiment to direct the holding of Courts-martial for the trial of offenders for any offence against the said Act and Articles committed during the time such Regiment shall not be embodied, and for the trial of any one who shall have deserted while the Regiment was embodied, and shall not have been apprehended till after it shall have been disembodied, but so that no punishment should extend to life or limb.<sup>2</sup> The provisions of the 55 Geo. III. c. 168, have been<sup>3</sup> made applicable to the Permanent Staff of the Militia for all offences committed against the Mutiny Act,<sup>4</sup> so that Courts-martial may be summoned at any time for the punishment of these Officers and Men.

18. II. The Yeomanry. (a.) As to Command.

(a.) Under the Act<sup>5</sup> of 1871 Her Majesty has further been pleased to place the several Regiments and Corps of Yeomanry Cavalry when assembled, marched, or doing voluntary military duty, and the Permanent Staff of such Corps at all times, under the command of the Officer Commanding in Chief and of the General and other Officers of the Regular Forces Commanding in the Districts and subdistricts in which such Regiments and

<sup>1</sup> 17 & 18 Vic. c. 105, sec. 53. 31 & 32 Vic. c. 76, sec. 12.

<sup>2</sup> 42 Geo. III. c. 90, sec. 103; 17 & 18 Vic. c. 105, sec. 33. See also 22 & 23 Vic. c. 38, sec. 12; 23 & 24 Vic. c. 94, sec. 15. 31 & 32 Vic. c. 76, sec. 7.

<sup>3</sup> 56 Geo. III. c. 64. <sup>4</sup> It is said “District” also. <sup>5</sup> W. O. Circulars, *sup.*

Corps are respectively assembled, marched, or doing military duty, and where such Permanent Staff are stationed.

19. (b.) As to Court-martial Jurisdiction—

Turning to the Statute which regulates this Force, it enacts:

(1.) That the force from the time of the summons of the “Lord-Lieutenant to assemble and until the enemy shall be defeated, &c. (the same to be signified by Her Majesty’s Proclamation) shall continue, and be subject to all provisions in the Mutiny Act and Articles of War in all cases whatever.”<sup>1</sup>

20. (2.) So again when they assemble (such assembling not being under the 46th section of the Act) “to do military duty, or for improving themselves in military exercise, or “for the suppression of riots,” such Yeomanry from the time of so assembling and during the period of their remaining on such military duty, or being engaged in such service as aforesaid, shall be subject to all the provisions of the Mutiny Act and Articles of War.<sup>2</sup>

21. (3.) The Permanent Staff of the Yeomanry “shall at all times be subject to the Mutiny Act and Articles of War, and shall be liable to be tried for any crime committed against such Act and Articles” by any Court-martial, according to the nature and degree of the offence, in like manner and under the like regulations as the Permanent Staff of the Military Forces, provided the Court-martial is composed of Yeomanry Officers, and that no punishment awarded extend to life and limb, except when such Corps is “called out in case of invasion.”<sup>3</sup>

22. III. The Volunteers. (a.) As to Command.

Under the Act of 1871,<sup>4</sup> Her Majesty has, moreover, been pleased to place all Volunteers, when assembled for drill or inspection or voluntarily doing any other Military duty under the command of the Officer Commanding in Chief and of the General and other Officers of the Regular Forces Commanding in the districts and subdistricts within which such Volunteers are undergoing inspection, or doing Military duty. And to declare that the Permanent Staff of all Administrative Regiments and Corps will be at all times under such Military Command.

<sup>1</sup> 44 Geo. III. c. 54, sec. 22.

<sup>2</sup> *Ib.*, sec. 23.

<sup>3</sup> *Ib.*, sec. 21.

<sup>4</sup> W. O. Circular, *sup.*

23. (b.) As to Court-martial Jurisdiction.<sup>1</sup>

The Volunteer Act, 1863, contains these enactments:—

(1.) All the Officers and Men (including the Permanent Staff) when in actual Military service are liable to all the provisions of the Mutiny Act (and also entitled to the benefits thereof) in all respects as the Officers and Soldiers of Her Majesty's Army, except that the Court-martial shall be composed of Officers of the Volunteer Force only.<sup>2</sup>

24. (2.) The Permanent Staff of the Volunteer Force when *not* on actual service, are subject to all the provisions of the Mutiny Act (and to the benefits thereof), subject to the variations and provisions which the 22nd Article of the Volunteer Act specifies.

25. (3.) The Act of 1871 also extended the Mutiny Act and Articles of War to the Volunteer Force without any limitation as to Punishment, thus:—"That where any part of the Volunteer Force is assembled for the purpose of being trained with the Militia, or Regular Forces, the Mutiny Act and Articles of War shall apply to the part of the Volunteer Force so assembled in the same manner as they apply in pursuance of the Volunteer Act, 1863, to Volunteers on Actual Service."

## 26. IV. The Reserve Forces. (a.) As to Command.

The Government and Command of the Army Reserve has undergone a change, though not to the same extent as that previously described with reference to the Militia. The history<sup>3</sup> of this force is also given elsewhere, and therefore, it is sufficient here to observe that it was organized by the late Lord Hardinge in 1842, as a Local Force to aid the Civil powers, within districts assigned by the Crown, to the administration of which, and the command of the Reserve men therein, Staff Officers of Pensioners were appointed from the half-pay list. The changes that have been made, will be traced in the following paragraphs.

27. Under the Act of 1871,<sup>4</sup> Her Majesty was further

<sup>1</sup> As to courts of inquiry, see App. M., *post*.

<sup>2</sup> 26 & 27 Vic. c. 65, sec. 23.    <sup>3</sup> Vol. I. p. 337.    <sup>4</sup> War Office Circular, *sup*.



pleased to direct that the Army Reserve (including the Enrolled Pensioners) shall be placed under the Command of the Officer Commanding in Chief and of the General and other Officers of the Regular Forces commanding in the Districts and subdistricts within which they are assembled for training or exercise.

28. (b.) As to Court-martial Jurisdiction.

The Reserve Force Act, 1867, enacts:—Whenever the Reserve Force, or any part thereof, is called out for training and exercise, or when any of such Force, having volunteered their services for that purpose, are kept on duty as aforesaid, or when such Force, or any part thereof, is called out in aid of the Civil Power as aforesaid, or is called out on permanent service under Her Majesty's Proclamation, all the provisions of that Act and the Articles of War in force shall apply to and in respect of the said Force, or such part thereof as may be or ought to be on duty on any of the occasions aforesaid, and the Officers and Non-commissioned Officers appointed to command them, as fully as such Act and Articles may be applicable to and in respect of Her Majesty's Regular Forces; and offences committed by such Officers and Non-commissioned Officers, and the Men of such Force, as may be or ought to be on duty on any of the occasions aforesaid, may be inquired of and tried by Court-martial assembled under the provisions of any such Act, according to the usual discipline of Her Majesty's Army; and Courts-martial for the trial of any such offences may be holden, and the Punishment awarded by any such Court-martial may be inflicted, either during the time for which such Officers, Non-commissioned Officers, and Men are or ought to be so on duty as aforesaid, or at any time within twelve months after the offence has been committed or the offender has been apprehended.<sup>1</sup>

29. V. The Militia Reserve. (a.) As to Command.

(a.) Until called out, these men remain in and form part of the Militia, hence they are commanded as such.

(b.) As to Court-martial Jurisdiction, the Act under which this Force was raised provides:—<sup>2</sup>

<sup>1</sup> 30 & 31 Vic. c. 110, sec. 12.

<sup>2</sup> As to (a), see Par. 7, *ante*.

“ During any time for which any Men enlisted under this Act may have volunteered to be trained and exercised with any part of Her Majesty’s Army, and whenever any Men enlisted under this Act are upon Army Service, all the provisions of the Mutiny Act and Articles of War shall apply to such Men, and to all persons whomsoever in respect of them, as fully as such Act and Articles may be applicable to and in respect of Her Majesty’s Regular Forces; and offences committed by such Men may be inquired of and tried by Court-martial assembled under the provisions of any such Act, according to the usual discipline of Her Majesty’s Army; and Courts-martial for the trial of any such offences may be holden, and the Punishment awarded by any such Court-martial may be inflicted, either during the time for which such Men have volunteered to be trained and exercised, or (as the case may be) are upon Army Service, or at any time within twelve months after the offence has been committed or the offender has been apprehended.”<sup>1</sup>

30. Looking at the various statutory enactments relating to these forces this advice, given in a recent Circular, should be regarded:—“ In exercising authority over the Auxiliary and Reserve forces, officers appointed to command must remember that these forces have been enrolled under conditions very different from those of the regular army. They must take great care not to exceed the powers conferred upon them by law, and in exercising the powers which they do possess must endeavour to carry with them as far as possible the opinions of the Commanding Officers of the auxiliary force. In all cases of doubt they will do well to refer to the Inspector-General of the auxiliary forces.”<sup>2</sup>

<sup>1</sup> 30 & 31 Vic. c. 111, ss. 11.

<sup>2</sup> Par. 2 of G. O. 32 of 1873 sets out the substance of the Circular in the following words. It states that although the Auxiliary and Reserve forces are not regular troops, when an officer is appointed to command them he must remember that he is responsible to all the officers comprising the force for the discipline and efficiency of the force, and that the force is to be treated as a regular force. The Circular also states that the force is to be treated as a regular force, and that the force is to be treated as a regular force.

## CHAPTER VI.

## MILITARY OBLIGATIONS.

1. As the responsibility of defending the Realm, so the power of engaging Officers and Soldiers for Military Service devolves on the Crown.<sup>1</sup> The terms upon which these engagements have been made have varied in some particulars, according to the exigencies of the times; but two conditions—one of inflexible loyalty to the Sovereign, and the other of implicit obedience to the General in Command—have never been wanting. To confirm and enforce these Military obligations, the Articles of War were formerly made as Royal Orders or Commands, and by the imposition of an oath, secured the allegiance of the Army to the person of the Sovereign, and obliged the affirmants to accept all his Royal commands as binding upon them to carry out as lawful orders.

2. Now and for the last 200 years and upwards the *substance* of the Officer's or Soldier's engagement with the Crown has been the same. The Officer's agreement is:—1. As towards<sup>2</sup> his inferiors, to take charge of the Officers and Soldiers serving under him, to exercise and well discipline them in arms, and to keep them in good order and discipline (those under him being commanded to obey him as their superior Officer). 2. As towards the Crown and his superiors, to observe and follow such orders and directions as from time to time he shall receive from the Sovereign or any of his superior Officers, according to the rules and discipline of law. The Soldier's agreement<sup>3</sup> (usually confirmed by his oath)<sup>4</sup> is:—1. To defend the Sovereign, his

<sup>1</sup> Vol. I. pp. 1 to 15.    <sup>2</sup> Vol. II. p. 65.    <sup>3</sup> Vol. I. p. 440; Vol. II. p. 36.

<sup>4</sup> Soldiers having been convicted by Court-martial of Fenianism, Mr. Secretary Bruce wrote on 17th March 1871, refusing to pardon them as "those who by *perjury* and mutinous acts have brought disgrace on the profession of Gallant

own and dignity, against all enemies; and, 2. To observe and obey all orders of his Majesty and of the Generals and Officers set over him.<sup>1</sup>

3. In the lesser matters of discipline—as disobedience to positive commands or neglect of Military duties—the power of the Crown, arising from this contract or engagement with the Officer and Soldier, is considerable, giving an absolute control over the service and pay of the Army. No command of the King and General can be disobeyed,<sup>2</sup> save at the peril of punishment by the Crown or trial by Court-martial; nor can pay, if withheld,<sup>3</sup> be recovered by legal proceedings against the Crown. Hence imposed service and pay withheld have been used as complementary punishments for breach of Military discipline.

4. The manner in which “Officers are commissioned,”<sup>4</sup> and “Soldiers”<sup>5</sup> are enlisted,” has been treated of at considerable length elsewhere. Each of them accepts his retainer at the assurance of the Crown, and may be displaced from his Military *status* at any moment that the Crown sees fit to discharge him, either with or without previous trial by Court-martial.<sup>6</sup> He has no right to resign his Commission or vacate his enlistment, while he is in the service of the Crown he is no longer *juris* to contract any other obligation, nor can he exercise the rights of Citizenship which may conflict with the obligation of implicit obedience under which he stands pledged to fulfil his Military duty.<sup>7</sup>

5. “The general purview of the Military Code shows that a soldier gives himself up wholly to his superior Officer in religion, politics, civil relations, loyalty, internal and external behaviour.”<sup>8</sup> He wears his clothes, cuts his hair, holds his person, and regulates

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liars.”—House of Lords Papers (31), 1 March 1872. Mr. Gladstone wrote, “we are compelled to view them differently, alike from a regard to general principles and by our duty as Ministers of the Crown to uphold the highest standard of honour and fidelity in the noble service to which they belong.”—*‘Times,’* 10th June 1872.

The native Indian soldier is sworn to allegiance, “and to go wherever I am ordered by sea or land,” and to obey all commands of the Officers set over him, even to the peril of my life.”—Art. 1 of 1869.

Vol. I. p. 144; Vol. II. p. 37.      <sup>3</sup> Vol. I. p. 98.      <sup>4</sup> Vol. II. Chap. XVI.

Vol. II. Chap. XV.      <sup>5</sup> Vol. II. pp. 118–123, 328.      <sup>7</sup> Vol. I. p. 160.

Said in argument, Warden v. Bailey, 4 Taunt. Rep. p. 80.

his step and action at the command of Officers appointed by the Sovereign.<sup>1</sup>

6. The Law which he has to obey may be divided into two branches, thus:<sup>2</sup>—

I. The "*Lex scripta*" which (may be changed<sup>3</sup> from time to time during his retainer, and) may be stated according to this order of obedience is comprised in:—

1. (a) The Mutiny Act, as the Law expressly sanctioned by Parliament.<sup>4</sup>
2. (b) The Articles of War, as the Law made by the Crown under Statutory Authority and in accordance with the Mutiny Act.<sup>5</sup>
3. (c) The Regulations or Orders made by the Crown without Statutory Authority, (a, b, and c, relating to the whole Army.)
4. (d) The District or Garrison Orders made by the General of the District or Governor of the Garrison, for the several Regiments under his Command.<sup>6</sup>
5. (e) The Standing Orders of the Colonel for the Officers and Men of his Regiment.<sup>7</sup>

All orders of subordinates must be consistent with supreme authority, and in case of the conflict of Laws,<sup>8</sup> that must be obeyed which is imposed by the higher authority.

7. It is perhaps needless to observe that the object of these Standing Orders is to train and maintain the Army in discipline—meaning by that word (to use those of the Great Duke<sup>9</sup>)

<sup>1</sup> Vol. II. pp. 37, 147; and sec. 6, par. 37 and 38, Queen's R. 1873.

<sup>2</sup> The Law is here set forth with special reference to the Army, but in its essential principles it is equally applicable to the Navy; indeed, *Johnstone v. Sutton* was a Navy case.

<sup>3</sup> See the question discussed in the American Courts, and so decided. *Vanderheyden v. Young*, 11 John. Rep. 158.

<sup>4</sup> Vol. I. pp. 5–11.

<sup>5</sup> Vol. I. pp. 149, 150.

<sup>6</sup> See Art. 75 of 1872.

<sup>7</sup> Ibid.

<sup>8</sup> I am thus explicit, having referred to Question 4092 and other evidence by the Judge Advocate General Mowbray in 1869, before the Courts-martial Commissioners.

<sup>9</sup> General Order, 24 September 1809, p. 118; and, in writing of our allies, he complained, "they want the habits and spirit of Soldiers,—the habit of command on one side and of obedience on the other: mutual confidence between officers and men. And, above all, a determination in the superiors to obey the spirit of the orders they receive, let what will be the consequence, and the spirit to tell

"habits of obedience<sup>1</sup> to orders, subordination, regularity, and interior Regimental economy," besides "drill." Obedience must be implicitly exacted by each responsible officer, "for nothing (even in Civil affairs) can be more dangerous than to allow the obligations to obey a law to depend on the opinion entertained by individuals of its propriety,"<sup>2</sup> and in military affairs it would be intolerable. "It is not sufficient," wrote Lord Orrery,<sup>3</sup> in 1677, "to make good Rules, unless the Prince or General see them punctually obeyed, or severely punished if broken. For besides the evil which attends the omitting of what is good, the contempt of authority is of fatal consequence in all human affairs, and most of all in Military, where, though what is commanded might have been indifferent itself, yet it ceases to be so when it is commanded; and if a Soldier of himself may break one Rule of the General's unpunished, he may believe thereby that he may as well break any, nay, all the rest; for the stamp of authority is alike on all, of which when a private person or many private men make themselves the Judges, they bid defiance to all discipline, without which no Society can subsist, and Military ones the least of any. In one word, it were much better that good Rules were not made, than, if made, that they should not be observed, and the breakers of them escape unpunished."

8. But this observance of Orders and Regulations is not for Peace only, but more especially for War. "Unfortunately the inefficiency of the Officers," wrote the Duke, "has induced many to consider that the period during which an Army is on service is one of relaxation from all rule, instead of being, as it is, that during which (of *all* others) every rule for the regulation and control of the conduct of the Soldier—for the inspection and care of his arms,<sup>4</sup> ammunition, accoutrements, necessities, and field equipments, and his horse and horse-appointments, for

the true course if they do not." Vol. iii. *ib.*, p. 854. And again, "The Commander of the Forces prefers a small but disciplined and well-ordered body of Troops, to a rabble, however numerous." G. O. 29 May 1809.

<sup>1</sup> "Obedience is the very life of an Army," Turner, p. 167.

<sup>2</sup> *Fergusson v. Earl of Kinnoul*, 9 Cl. and Fin. p. 324.

<sup>3</sup> 'Treatise on the Art of War.' London, 1677.

<sup>4</sup> See Officers ordered into arrest for neglect of this duty. Vol. xiv. Sup. Dis., p. 39.

the receipt and issue and care of his provisions, and the regulation of all that belongs to his food and forage for his horse, must be most strictly attended to, if it is intended that an Army—a British Army in particular—shall be brought in a state of efficiency to meet the enemy in the day of trial.”<sup>1</sup> For the object of all disciplinary training is to use against the enemy the strength accumulated from 1000 with the precision of one man.

9. II. The “*Lex non scripta*,”—those lawful orders which *vivâ voce* or otherwise, the Commanding Officer may from time to time issue, bidding a subordinate to do or refrain from doing as a Soldier, certain acts till then undisclosed to him. Of course in War there is no limit to obedience (“which is the first, second and third duty of a Soldier at all times,”<sup>2</sup>), save a physical impossibility to obey. “A subordinate Officer must not judge of the danger, propriety, expediency, or consequence of the order he receives: he must obey—nothing can excuse him but a physical impossibility. A forlorn hope is devoted—many gallant men have been devoted. Victories have been obtained by ordering men upon desperate services, with almost a certainty of death or capture.”<sup>3</sup> In Peace these orders must be plainly within the limits of the Officer’s authority;<sup>4</sup> but, for the maintenance of discipline, he may interdict the Officer’s or Soldier’s departure from the Camp or Barracks,<sup>5</sup> or his attendance at particular meetings or places<sup>6</sup> either in or outside the Camp or Barracks.

10. Possibly in matters of quasi social or political importance a controversy may arise, but “it would,” said the late Sir Robert Peel, “be utterly impossible to maintain discipline if soldiers were allowed to be political partisans, correspondent to newspapers, or members of political clubs. Then, indeed,

<sup>1</sup> Memo. to Officers, 28 November 1812, Vol. vi. p. 181; and see Vol. i p. 236, and General Orders of 20th August 1810, and 18th March 1811, 3rd Memo. 1812, as to half-yearly reports of 17th May 1813.

<sup>2</sup> Johnstone v. Sutton, 1 Te. Rep. p. 549, and the Duke’s G. O. of 11th November 1803.

<sup>3</sup> *Ib.*, p. 546.

<sup>4</sup> See the subject discussed, Vol. I. pp. 155–164, Vol. II. pp. 66, 144–154.

<sup>5</sup> See Duke of Wellington’s Memo., Vol. viii. Desp. p. 346. If the Officer acts oppressively, no doubt he would be liable to Court martial. 26 H.D. (O.S.), 115.

<sup>6</sup> Vol. I. pp. 160–161.

standing Army would be in truth a curse—then they [the House of Commons] might bid farewell to liberty. It was fairly in the power of the Commanding Officers to interdict a Soldier's communication with the newspapers<sup>1</sup> and to prevent his being a member of a political club. He denied the truth of the doctrine that a Soldier continues to enjoy *all* the rights of a citizen. It was clear that he must forfeit that portion of his civil rights which would interfere with the discipline of the Army."<sup>2</sup>

11. The great bane of any Army is "party spirit," not only with reference to the affairs of the State, but to the merits or demerits of any Military System, or of any Commander. In the Commonwealth<sup>3</sup> the evil of a compact body of armed politicians, sustained at the public cost, but not controlled by the strong arm of power, destroyed all Government. In the Army of the Peninsula no General could have more earnestly guarded against this—as the greatest evil to the Military efficiency of the Army—than the Duke of Wellington. "As soon as an accident happens," he wrote in reference to a charge made by the 16th Hussars, in which a mistake had occurred, "any man who can write, and who has a friend that can read, sits down to write his account of what he does not know and his comments on what he does not understand, and these are diligently circulated and exaggerated by the idle and malicious, of whom there are plenty in all armies. The consequence is that Officers and whole Regiments lose their reputation; a spirit of party—which is the bane of all armies—is engendered and fomented; a want of confidence ensues, and there is no character however meritorious, and no action however glorious, which can have justice done it. I have hitherto been so fortunate as to keep down this spirit in this Army, and I am determined to persevere."<sup>4</sup> And in another (earlier) despatch,<sup>5</sup> he points out "the error of Officers in high Command making partisans of those placed under them,

<sup>1</sup> Forbidden to the Navy, Ad. Reg. p. 106.

<sup>2</sup> Vol. I. p. 161.

<sup>3</sup> Vol. I. p. 2, and Vol. II. pp. 59, 316.

<sup>4</sup> Desp. of July 1810, Vol. i. p. 180. In 1813 all the Officers of the 85th Regiment were exchanged to other Regiments, to break up this spirit. Hough (1825), p. 354.

<sup>5</sup> In Vol. iii. p. 620, and see p. 671.



instead of making all obey the Constituted Authorities of the State."

12. But one obligation of paramount importance is submission to the Military Code and those Tribunals under which the Officer or Soldier is amenable to punishment for any Military offences. These Courts, when acting within their jurisdiction, are supreme over the Officers and Soldiers in the Army, and they cannot rightfully complain that as such they are arraigned before them. It will be seen, from the earliest and the latest Codes, that for the adjudication of all matters relating to Officers or Soldiers *inter se*, these Tribunals have been specially constituted; and that an appeal for pecuniary damages to a Civil Tribunal for a Military injury would be a direct violation of that obligation to obedience which every one accepts by his Commission or Enlistment.<sup>1</sup>

13. The Articles of War, supplemented by the Queen's Regulations,<sup>2</sup> provide a method for the redress of grievances, by giving to the Inferior the right of personal complaint to the General Officer on his half-yearly Inspection for wrongs suffered at the hands of a Superior Officer.<sup>3</sup> It has elsewhere been pointed out that the Articles of 1672 permitted a reasonable complaint of this nature to be urged, and those of 1717 expressly provided the same remedy. The Officer wronged was first to complain to his Colonel,<sup>4</sup> then (if refused redress) to his General, that justice might be done upon his report of the case to the Crown. When the complaint was against the Captain, the Colonel was to summon a Regimental, with an ultimate appeal to a General Court. In either case, if the appeal should appear vexatious or groundless, the appellant was liable to punishment by the General Court, or if the Superior Officer had to make restitution, then he was also to be punished.

14. The present Code, so far as it relates to Soldiers, varies

<sup>1</sup> See the admirable Judgment of Mr. Justice Willes in *Dawkins v. Rokely* (*infra*), and Ch. Bar. Kelly in *ib.* 8 L. R. (Q. B.) 262.    <sup>2</sup> Sec. 198-9 of 1868.

<sup>3</sup> As to the Navy N. D. A. (Sec. 28) and Ad. Reg. p. 105.

<sup>4</sup> Art. 19.

somewhat from that of 1717. The complaint is now confined to matters affecting "pay or clothing,"<sup>1</sup> and where made, obliges the Colonel to summon a Regimental Court of Inquiry, from which either the Captain or the Soldier may appeal to a General Court-martial, with liberty to be heard by himself and witnesses, though at the risk of incurring such punishment as a Court-martial shall award, should the appeal be pronounced groundless and vexatious. This is the only remaining instance under the Military Code in which a General Court-martial is recognized as one of appeal from the findings of any Inferior Court.<sup>2</sup>

15. This provision, as relating to *Officers*, came under the notice of Parliament in 1810, when it appeared to be admitted that the Commander-in-Chief (to whom the General's Report should be sent) had a discretion in submitting to, or withholding from, the Sovereign a report of the case.<sup>3</sup> The Article is found in the present Code,<sup>4</sup> and came under discussion before a Court of Law, probably for the first time, in 1866. The object of this Article is to establish a domestic forum<sup>5</sup> to settle those professional disputes incident to, and which are to be governed by the rules and customs of, the Military Service. If the torts and wrongs "sounding in damages" were to be subjects of legal controversy before the Common Law Courts, great evils would arise; for not only would the position of a Commanding Officer be attended with personal risk (not exaggerated in the judgment pronounced in *Sutton and Johnstone*),<sup>6</sup> but, what is far worse than this, "the spirit of party—the bane of all armies"—would arise, and then, to use the words of the great Duke, "we should be in a bad way indeed."<sup>7</sup> The essential purpose of the Military Code is to prohibit all personal and acrimonious controversy.<sup>8</sup>

16. Military Tribunals are part of the Constitutional Law of the Realm, not for the welfare of the Army alone, but for the protection of the Civil Community. Given a Standing Army, and Military Tribunals are a necessity. "The Army being esta-

<sup>1</sup> Art. 13.

<sup>2</sup> Compare sec. 16 of Mutiny Act, 6 Vic. c. 3, and 7 Vic. c. 9, and Chap. XII.

<sup>3</sup> *Captain Foskett's Case*, 16 H. D. (O.S.), p. 746.

<sup>4</sup> Art. 12.

<sup>5</sup> *Timms v. Williams*, 3 Q. B. Rep. p. 422; *Dawkins v. Rokeby*, 4 Fes. and Fin. p. 833.

<sup>6</sup> 1 Te. Rep.

<sup>7</sup> *Gur. Desp.*, Vol. iii. pp. 620 and 671, Vol. iv. p. 180.

<sup>8</sup> Vol. ii. p. 346.

blished by the authority of the Legislature, it is an indispensable requisite," said Lord Loughborough,<sup>1</sup> "that there should be order and discipline kept up in it, and that the persons who compose the Army, for all offences in their Military capacity, should be subject to trial by their Officers. That has induced the absolute necessity of a Mutiny Act, accompanying the Army. One object of that Act is to provide for the Army, but there is a much greater cause for the existence of that Act, viz, the preservation of the peace and safety of the kingdom. The object therefore is to create a Court invested with authority to try those who are part of the Army, in all their different descriptions of Officers and Soldiers, limited to breaches of Military duty."

17. The State in its Civil aspect delegates Judicial functions to Military Officers—places them in command over and holds them responsible for the good order<sup>2</sup> and discipline of their subordinates. It would be most unreasonable, therefore, to deprive Officers acting in the Military Administration of Justice of that established rule of Law which grants immunity from civil actions to those who as Judges, Juries, or Witnesses, are acting in the Civil Administration of Justice. And the Common Law Courts have uniformly refused to do so,<sup>3</sup> for the case of *Sutton v. Johnstone* (which goes beyond this) shows that an Inferior Officer cannot rightfully appeal for pecuniary compensation to a Court of Civil Judicature against his Superior Officer for initiating Court-martial proceedings against him without reasonable or probable cause. "The occasion," said the learned Judges,<sup>4</sup> "has often arisen when men put upon their trial before a Court-martial have thought the charge without a probable cause, and have warmly felt the injury of such an act of malice or oppression; yet, till this experiment (in 1786), it never entered into any man's head that such an action as this would be brought. What condition would a Commander be in if, upon exercising his authority, he is liable to be tried by a Common Law Tribunal? If this action

<sup>1</sup> *Grant v. Gould*, 1 H. B. p. 100. The same rule equally applies to the Navy. See *Sutton v. Johnstone*, *ante*.

<sup>2</sup> *Grant v. Gould*, *ut sup*.

<sup>3</sup> *Dawkins v. Rokeby*, 4 Fos. and Fin. p. 831; *Same v. Paulett*, 9 B. & S. p. 769.

<sup>4</sup> Lords Mansfield and Loughborough.

be admitted every acquittal before a Court-martial will produce one. The person unjustly accused is not without a remedy—that which is best among Military men: reparation is done him by his acquittal, and he who accused him unjustly is dismissed the Service and blasted for ever.”<sup>1</sup>

18. The current of legal authority has been consistent with this ruling of Lords Mansfield and Loughborough in this celebrated case. The Common Law Courts have uniformly refused to sit as Courts of Error or Appeal in matters over which they exercise no original jurisdiction.<sup>2</sup> “It is clear,” said Mr. Justice Willes, in a very recent case, “that with respect to those matters placed within the Jurisdiction of the Military Forces, so far as Soldiers are concerned, Military men must determine them. Persons who enter the Military state—who take Her Majesty’s pay, and who are content to act under her Commission—although they do not cease to be citizens in point of responsibility, yet they do by a compact (which is intelligible and requires only the statement of it to recommend it to the consideration of any one of common sense) become subject to Military rule and Military discipline;” adding, with some emphasis, that an appeal against the authority of those tribunals, by one subject to them, is a course which cannot be pursued in the Civil Courts.

19. In later passages reference will be made to other decided cases, in which the aid of the Common Law Tribunals has been invoked to restrain the proceedings of Courts-martial to the limits of their Jurisdiction; therefore, to pursue the subject here would oblige a repetition hereafter; but, before closing this chapter it may be remarked that as no one is entitled to require the Crown to prosecute him in the ordinary courts of the kingdom, neither has an Officer any manner of right to call

<sup>1</sup> 1 Te. Rep. pp. 548-550. In a somewhat earlier and analogous case (1781), where trespass was brought by a person seized in a prize ship, which was restored by the Court of Admiralty, the Court of King’s Bench refused to aid the plaintiff to recover damages for this exercise of authority. “The inconvenience of entertaining such causes would be intolerable,” said Mr. Justice Ashurst, “and the Admiralty having jurisdiction in the original matter, ought also to have jurisdiction in everything necessarily incident.”—*Le Caux v. Eden*, 2 Dougl. Rep. p. 601.

<sup>2</sup> *Grant v. Gould*, *sup.*, 1866; *Dawkins v. Rokeby*, 4 Fes. and Fin. p. 831, and in error (1873), 8 L. R. (Q. B.) 262.

on the Crown to arrest him, or after arrest to incur the waste of public time and money by assembling a Court-martial for his arraignment on any charge that may free his character from doubt or suspicion. "Every one," said Mr. Villiers (as Judge Advocate General), "might ascertain, by searching the most elementary works upon the military system of this country, that an officer has no right *whatever* to a Court-martial as a means of inquiry into his conduct."<sup>1</sup>

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<sup>1</sup> Vol. I. p. 177; Vol. i. M.A.R. C. M., p. 433, citing G. O. of 1st Feb. 1804. *Dawkins v. Rokeby*, 8 L. R. (Q. R.) 262. Where a Naval Officer refused to return to his duty without a trial, he was tried for disobedience to orders and dismissed the Service (1810). Vol. ii. Ad. Op. 294.

## CHAPTER VII.

## MILITARY PROCEDURE AND JURISDICTION.

1. MILITARY obligations are, as I have already observed, to be enforced by Military Tribunals, and the Marshal's Court, referred to in the several Codes of Charles I.'s reign, appears to have been created for this purpose in analogy to the Court of the Constable and Marshal, which the Statute of Richard II. c. 2, expressly recognised "as having cognizance of contracts touching deeds of Arms and War out of the Realm;"<sup>1</sup> and also of War within the Realm which cannot be determined nor discussed by the Common Law, with other usages and customs to the same matters pertaining."

2. The summary power of the Marshal, and of his deputies, in matters within his Jurisdiction was alleged to be absolute, even in life or death. His judicial proceedings were unfettered by forms, and his powers of punishment both plenary and summary. His sentences were executed in the King's name, and no appeal could be made against his decrees, save to the person of the Sovereign. The office of Constable having lapsed on the attainder of the Duke of Buckingham in 1521, this Jurisdiction (as some doubt appears to have been entertained whether the Marshal alone could exercise it) was permitted to fall into desuetude until sought to be revived in 1639: whereupon the Commons declared the Marshal's Court to be a grievance.<sup>2</sup>

3. The difficulties which beset the adoption of a Military Code with Military Tribunals may be gathered from the Petition

<sup>1</sup> A writer of 1602 describes their Jurisdiction as including trespasses and hurts done by one Soldier to another; that for any Soldier to arrest another, but by the Marshal, was punishable; to punish Sutlers and those who failed in watching and warding.\*

<sup>2</sup> Vol. I. p. 23.

\* Tytler's Essay, p. 379, note.

of Right and the letter of Lord Conway already printed. The contention of Parliament was that the Soldier should never be withdrawn from the protection, nor from the punishments, of the Common Law Tribunals. The Generals, whether in command of the Royal or of the Parliamentary Armies, were on the other hand equally agreed that "the Soldier must be punished by his Officer," or, in other words, that the discipline of the Army could only be maintained by absolute power being vested in the supreme Military Chiefs and in the Military Tribunals constituted under their authority. A Commission of Oyer and Terminer under the Great Seal directed to the Officers in the Field and some country gentlemen for the trial of the members of the Army *in pay* was suggested by the Commons during the Rebellion,<sup>1</sup> but Lord Essex replied, that "if Parliament allow him no Commission of Martial Law, he could not be answerable for what mischief might happen or disorder that might ensue. So that at last this concession was made to him, and the Article of War known by his name were put forth in 1642, with the sanction of both Houses of Parliament.

4. In tracing the Articles of War during the reigns of the Stuart kings, the reader will have noticed that provision was there made with more or less particularity for the "administration of justice" in the Army. Towards the close of James II.'s reign, the method of proceeding was formulated; but the adoption of this system in the English Army was severely criticised in Parliament. By a comparison of the contents of a work styled 'The Art of War and Way as it is practised in France, by Louis de Gaya, an expert Officer in the French Army,' translated into English and published at London in 1678, with the directions put forth by James II. in 1686, with regard to "Military Discipline," the reader will be able to judge how far the objection to the military system as coming from France was well founded.<sup>2</sup>

5. The work is divided into two parts. The arrangements described in the first are those of an Army generally, and the various Staff Officers commanding it; in the 2nd, those of a Regiment, and of the Officers composing it. In the 1st

<sup>1</sup> Vol. I. p. 23.

<sup>2</sup> Parl. Hist. 605-9.

part—after the passage which I have transcribed on the title page of this work—the author goes on to describe<sup>1</sup> “the duties of the Provost Marshal of the Army and his way of Justice.” “He hath a troop of Officers on horseback with a Lieutenant Exempt, a Clerk to record his processes, and an executioner to punish those that offend against the orders of the King and General.” In the 2nd part<sup>2</sup> he treats of “the Provost Marshal of a Regiment,” as having under him Officers similar to those under the Provost Marshal of the Army. His duty is to pursue and apprehend deserters and delinquents, to bring in indictments, interrogate and confront witnesses; and the process being drawn up, he carries it to the Major, who gives the conclusions for the Colonels and Captains afterwards to judge.

6. The author then proceeds<sup>3</sup> to treat of “Councils of War,” dividing them into “General Councils of the Army” held at the General’s lodgings or tent, and “Private Councils” held at the Governor’s quarters in Garrison, or at the Colonel’s tent in Camp. The proceedings of the latter Council he describes thus,—that the Colonel sits as “President” at the top; the Major, as King’s Proctor or Solicitor, at the end; and the Captains, according to seniority, at the sides of the table. The Subaltern Officers had a right to stand uncovered at the Captain’s backs, but had no vote. After deliberation, and at the request of the President, each Captain gave his opinion, beginning with the youngest till it came to the President, who pronounced last. The Clerk—taking down their votes, and according to the plurality of votes—drew up the Sentence, which was signed by the President and Captains.

7. In Criminal cases, more care was to be taken to secure the attainment of Justice.<sup>4</sup> The Council should never consist of less than seven Officers; and if Captains could not be obtained, inferior Officers, even to Sergeants, were to be called in. The Officers forming the Court were to come fasting, and after Mass. The Clerk was to read out the informations, and the evidence sent up by the Major. The prisoner being then introduced,

<sup>1</sup> Chap. xiv.<sup>2</sup> Chap. xiii.<sup>3</sup> Chap. xx.<sup>4</sup> From the perusal of the Bazaine Court-martial, it would appear that the same method of procedure still prevails in France.



and sitting on a footstool, was questioned on the facts, and then sent back to prison. The Clerk having informed the Court of the conclusions of the Major, each Officer was to give his vote according to his conscience, and the ordinances of the King. The finding and sentence were then recorded. On the execution of the prisoner, the Regiment was summoned by the Major to witness it; and the Criminal, first being degraded from the Army by the Major, then was executed under the orders of the Provost Marshal.

8. The discipline of each Company was with the Captain, who appointed, but could not degrade, the Non-commissioned Officers, that being reserved for the Council of War. Soldiers in rebellion he could kill; but no other offence could he punish, except by imprisoning the offender and delivering "him up to the Justice that is set over the Regiment."

9. The directions issued in 1686 by James II. with regard to "Military discipline,"<sup>1</sup> were to this effect:—In an Army the Council of War is always to meet at the General's quarters or tent, and none are to be called to it but the Lieutenant-Generals, the Major-Generals, the Brigadiers, and the Colonels and Commanders of Bodies when the matters concern their Regiments. Private Councils of War or Courts-martial in a Garrison are either held at the Governor's house, at the Morning Guard, or where the Governor orders; in a Camp, at the Colonel's tent, who causes notice to be given to the Captains to be present.

10. When all are met, the Governor or General, or he who is to sit as President, takes his place at the head of the table. The Captains sit about, according to their seniority; that is to say, the first Captain on the right of him that presides, the second on the left, and so of the rest; and the Town Major or the Assistant Major or Quarter-master of the Regiment, who in the absence of the Judge Advocate, discharges his office, is to sit in his place at the lower end of the table. The Lieutenants, Sub-Lieutenants, and Ensigns have a right to enter into the room where the Council of War (or Court-martial

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<sup>1</sup> This is printed from Grose, Vol. ii. pp. 137, 138, but I have failed to trace the original in the War Office Records.

is held; but they are to stand at the Captain's backs, with their hats off, and have no vote.

11. If the Council be called to deliberate on some matter of consequence, the President, having opened it to the Court, asks their opinions. The youngest Officer gives his opinion first, and the rest in order, till it come to the President, who speaks last; the opinions of every one being set down in writing. The result is drawn conformable to the plurality of votes, which is signed by the President only. If the Council of War or Court-martial be held to judge a Criminal, the President and Captains having taken their places, and the Prisoner being brought before them, and the information read, the President interrogates the Prisoner about all the facts whereof he is accused; and having heard his defence, and the proof made or alleged against him, he is ordered to withdraw, being remitted to the care of the Marshal or Gaoler. Then every one judges according to his conscience and the Ordinances or Articles of War. The Sentence is framed according to the plurality of votes, and the Criminal being brought in again, the Sentence is pronounced to him in the name of the Council of War or Court-martial.

12. When a Criminal is condemned to any punishment, the Provost Marshal causes the Sentence to be put in execution; and if it be a public punishment, the Regiment ought to be drawn together to see it, that thereby the Soldiers may be deterred from offending. Before a Soldier be punished for any infamous crime, he is to be publicly degraded from his arms, and his coat stript over his ears. A Council of War or Court-martial is to consist of seven members at least, with the President, when so many Officers can be brought together; and if it so happen that there be not Captains enough to make up that number, the inferior Officers may be called in.<sup>1</sup>

13. Something of the actual mode of Judicial procedure in the same reign, is to be gathered from the Record of a General Court-martial after Monmouth's Rebellion, printed elsewhere,<sup>2</sup> and from the Court-martial Books of that period, in which are

<sup>1</sup> Reference may be made to 2 & 3 Edward VI. c. 2, sec. 8, and 5 & 6 Ph. and Mary, c. 3, secs. 4 and 5. Vol. I. p. 352.

<sup>2</sup> Vol. I. pp. 475-478.

usually found entered (1) "the original Warrant for holding the Court; (2) the Proceedings thereunder; and (3) the Sentence." It was generally the practice to issue a separate Warrant for each particular case; but in February, 1687-8 James II. appears to have contemplated the establishment of a permanent Court for trial of all matters, not only of discipline but of legal wrong in which any members of the Army were the defendants.

14. A Royal Sign Manual Warrant, under Sunderland countersign, was therefore issued, appointing a Council<sup>2</sup> of the Chief Officers of the Army, or a General Court-martial, consisting of fifteen members and a President, of whom any five with the President, should form a quorum, to meet constantly every week. Twelve General Officers were appointed to act each as President for one month together, according to the order of rank, and thirteen other Officers as Members or Judges of the Court.

15. This Court so constituted was authorized (as was the usual with ordinary Courts-martial) to hear and examine, by affidavit<sup>3</sup> or otherwise, all such matters and informations as should be brought before it touching any misdemeanour or misbehaviour of any Officer or Soldier, as also such witnesses upon oath, as might be able to give testimony concerning the same. After the hearing the Court was authorized to give judgment and sentence according to the Articles of War, and to put the same in execution according to Military Discipline or in extraordinary cases to report the same that the pleasure of the Crown might be declared.

16. The same Court was given authority to inquire in like manner into all disputes and differences arising between an Officer or Private Soldier, or any other person not being in the Military Service, or touching any injury, hardship, or disorder whereof complaint should be made against any Officer or Soldier by such other person; and the Warrant directed the Court, after full examination and hearing of the said matter

<sup>1</sup> See entry under date of 12 March 1685-6, on the Articles of War before referred to in C. M. Bk. (114), p. 46.

<sup>2</sup> C. M. Bk. (114), p. 80.

<sup>3</sup> The Court proceeds on the best evidence it can obtain. *King v. Suddi* 1 East. Rep. p. 310.

and persons, to report to the King, that he might give such further order thereon as to justice should appertain. The Judge Advocate General or his deputy (approved by the Court) was always to attend the Council or Court, and to receive and observe the directions of the Court or its President ("as in all things he was bound to do according to the duty of his place").

17. This Court appears to have commenced its sittings "in the Great Room of the Horse Guards," on the same day on which the Warrant was dated, viz. 27th February, 1687-8, and had five recorded sittings on various subjects; the last entry being of a Court held on the 20th of April, 1688, in which a supposed religious difference between a Roman Catholic and Protestant appears to have been brought to the notice of the Court. I am not aware that it ever caused any practical grievance to the Civil Community, but in adjudicating upon or seeking to redress the wrongs of the Citizen against the Soldier by remitting the case to the King instead of the Judges,—a departure was made from the fundamental principles of the Constitution, and the rule which the King himself laid down for the guidance of the Army after the Rebellion of Monmouth was violated.<sup>1</sup>

18. The Mutiny Act, as I have before observed, gave statutory authority to Military Tribunals for the trial of certain specified offences without making any organic change in their method of procedure. This is apparent from the entries in the War Office books, which (notwithstanding a revolution had intervened) are continuous. For the trial of offences, made capital, the Act was, in the first instance, recited<sup>2</sup> and in later practice annexed to<sup>3</sup> the Court-martial Warrant, for the guidance of the General Officer, to whom the Warrant was addressed. To the Court, as theretofore, a discretion was given in criminal cases<sup>4</sup> to take evidence, either *viva voce*, by affidavit,<sup>5</sup> or otherwise, and power was originally given to inflict immediate punishment according to the provisions of the

<sup>1</sup> Vol. I. p. 478, Letter to Col. Kirke, of July 1685, and Chap. IV. par. 9, *ante*.

<sup>2</sup> Warrant of 29 April, 1689.

<sup>3</sup> Warrant of 9 February, 1696-7; and Vol. I. p. 503.

<sup>4</sup> Warrant to the Duke of Marlborough for Court-martial, (1) at Blackheath, 21 July, 1690, (2) at Portsmouth, 22 August, 1690.

<sup>5</sup> In cases of false Musters, the Judge Advocate General took the Affidavit at his Office, C. M. Bk. (114), p. 127.

Statute. Articles of War were, however, soon put forth by William III.,<sup>1</sup> restraining the execution of Capital Punishment until the proceedings of the Court had been submitted to the King, and his directions declared thereon.

19. For the trial of other offences, made punishable by "the Rules and Articles of War," Court-martial<sup>2</sup> Warrants were issued as formerly; and six—not thirteen—Officers were declared to be a quorum for such Courts. In course of time—in 1695, when the King left for Holland—General Warrants were issued for the summoning of Courts-martial for the trial "of all such matters and informations touching any criminal misdemeanours, or misbehaviours amongst our Forces;" and authority was granted to these Courts "to give Judgment and Sentence therein according to the Mutiny Act (as far as it might relate thereto) or otherwise" according to "the Rules declared and applied for the better government of our Land Forces leaving the proper constitution of the Court to the knowledge of those Officers who should act as Judges,<sup>4</sup> and sanction the infliction of punishment. In this manner, the Military Code (whether under the Act or Articles) became one in its administration—varying from the purely prerogative Code in the increased severity of its punishments; for as death could not legally—so, in practice, it was frequently—inflicted under the Mutiny Act for offences which never should have been punished.<sup>5</sup>

20. The only practical effect of the Act during the reign of William III. was to give legal sanction to the infliction of Capital and Corporal Punishments by Courts-martial in time of Peace on Soldiers for political offences, quasi-military in the character. There was, certainly, no intention to alter the nature or constitution of those Courts, nor in any degree to assimilate them to the ordinary (Legal and Equitable) Courts of the Realm. The well-known Commentator, 'On the Laws of England

<sup>1</sup> The 52nd Article. See C. M. Warrant, 15 July, 1690, C. M. Bk. (114), p. 1. Articles were also issued for the Troops in Holland, *ib.* p. 114.

<sup>2</sup> Warrant of 26 February, 1693-4, p. 119.     <sup>3</sup> C. M. Bk. (114), pp. 132-133.

<sup>4</sup> Attorney-General's Opinion, 1694, Vol. I. p. 502.

<sup>5</sup> Col. Gibson's Letter to Queen Mary, 1693, Vol. II. p. 41, and see Vol. p. 503.

described these Military Tribunals as "*sui generis*:" originally they were no Courts, except "of discipline and honour," but by the Act they became legally constituted Tribunals for the public safety—so far as the maintenance of the Army within the strict rules of discipline conduces to that object. Hitherto they have admirably fulfilled their end: for where, but in England, has an Army been found which at all times has been loyal to the Throne, and yet subservient to the Common Welfare of the People?

21. Further it must be noticed that in all the ordinary Courts of the Realm, the Crown has delegated its whole Judicial Power<sup>1</sup> to the Judges; but this is precisely what the Crown has not done, or ever yet been advised to do, in the case of Military Tribunals. As responsible to the Civil Community for discipline, the Crown and the Military Officers under the Crown must hold supreme power over the Army, and hence "the discretionary power of Courts-martial is guided," as Blackstone remarks, "by the directions of the Sovereign." To aid rather than control this authority, these Courts have been instituted; and hence no Sentence of a Military Tribunal can be carried into effect without a prior confirmation of all its proceedings by the author of its Jurisdiction, from whom (either as King, General, or Colonel) the delegation came.

22. But this method of administering Justice has at various periods of our history given rise to much controversy. "The first maxim of a free State," wrote Paley, "is that the laws be made by one and be administered by another set of men—in other words, that the Legislative and Judicial characters be kept separate."<sup>2</sup> The next security is the independency of the Judges;" but in the Military system the political *virus* was to be found not only in implicit obedience to the law made by the Royal Command, but in the facility for the punishment

<sup>1</sup> "And the Judges informed the King [James I.]," wrote Lord Coke, "that no king after the Conquest assumed to himself to give any judgment in any cause whatsoever which concerned the administration of Justice within the Realm. And the King cannot arrest any man, for the party cannot have a remedy against the King: so, if the King give any judgment, what remedy can the party have?"—*Prohibitions del Roy*, 12 Co. Rep. p. 63; and Chap. X. par. 6, *post*. Surely the Crown can order a Military arrest? King v. Browne 2 Show Rep. 484.

<sup>2</sup> See Sir Charles Napier's definition of "Martial Law," Chap. XI. par. 14, *post*.

of disobedience, and of quasi-political crimes, by Military Tribunals convoked under the same Royal authority, a Commission<sup>1</sup> was issued thus in the first year of William III.'s reign to several General Officers attached to his dynasty to visit and review the Regiments quartered throughout the country, with instructions to enquire of the gentlemen of the county "what Officers and Soldiers have given any cause of being suspected of being disaffected to *our* Government," and should they be found "unfit to serve in respect of their disaffection to our service," they were to be disbanded, this Commission (dated the 10th) was on the 22nd of May, 1689, supplemented by another to the same Commissioners, enabling them to summon Courts-martial under the Mutiny Act to hear and examine all such matters and informations as should be brought before them touching the misbehaviour of any Officer or Soldier by Mutiny or Desertion.<sup>2</sup>

23. The records of Courts-martial<sup>3</sup> both before and after the passing of the Act, show that offenders were brought before these Courts for offences of Sedition which might reasonably have been punished by the Common Law Tribunals, had the evidence and crime been such as to satisfy the Jury that the accused deserved punishment. Parliament was therefore very jealous of extending a system of Judicature which had a political significance, and (if the Army increased, or the operation of the Act was extended beyond the Army) placed a large number of their fellow-citizens under a political interdict.

24. But the legitimate purpose for which the Jurisdiction of Military Tribunals should be evoked, is to enforce Military duties or obligations; especially discipline or obedience to the authority of the Military Superior giving lawful orders to those subordinates to the Army placed under his command. On this principle of the Mutiny Act no better legal commentary is to be found than in the Judgment of Lord Loughborough in the great case of *Grant v. Gould*, already quoted; nor can anything be clearer than that the equality of right or status, which is justly upheld before the Civil, does not exist before

<sup>1</sup> Vol. II. p. 356.

<sup>2</sup> C. M. Bk. (114), p. 89.

<sup>3</sup> James II., Vol. I. p. 476; Geo. I., *ib.* p. 519; and see the *Jamaica Court-martial at Morant Bay*, Vol. II. pp. 177, 490-497.

the Military Tribunals, as sanctioned by the Legislature. There the relationship is essentially that of subordination, and hence these Tribunals can only be put in motion at the will of the Superior—against or to maintain discipline over the Inferior.<sup>1</sup>

25. Under certain given circumstances, a Court-martial may, no doubt, be originated at the instance of, and a charge be supported by, an Inferior<sup>2</sup> against his Superior Officer; but the consequences resulting to the accusers from an acquittal, in either case, are very widely different. The Inferior arrested and arraigned at the instance of a Superior Officer, and acquitted by a Court-martial,<sup>3</sup> has no legal remedy for his arrest or arraignment—because both were Official Acts within the scope of the Superior Officer's duty.<sup>4</sup> When, however, the charge of the Inferior against his Superior fails, the accusation may become a crime of insubordination for which an adequate punishment must be immediately awarded against the accuser.

26. The intention of Parliament as indicated by the original Act, was plain. In the first place, only Officers or Soldiers were to be subject to Military Tribunals—and then only for certain specified offences. Who are those persons, and what are these offences, will be seen by reference to the Military Code, and form the subject of consideration in the remaining paragraphs of this chapter.

#### I. As to the persons liable to Courts-martial.<sup>5</sup>

27. Who of Her Majesty's subjects are amenable to the command or lawful orders of Military Officers, and to the Jurisdiction of a Court-martial, is a question to be determined under two conditions: 1st. Of Statutory Enactment; and, 2nd. Of holding an Appointment or receiving pay from the Crown. These conditions being fulfilled, the liability to Military Law is complete. "The Act," said Lord Loughborough, "does not leave it to a question whether his enlistment and attestation are regular; but it says, any person who shall be enlisted or

<sup>1</sup> *Dawkins v. Rokeby*, 8 L. R. (Q. B.) 262.

<sup>2</sup> The Duke considered such an accusation a very serious matter, and ordered a Court of Inquiry before entertaining the complaint. Vol. xiv. Supp. Desp. p. 168-9. Inferior Officers in Col. Quentin's case dismissed. Hough, (1825) p. 351.

<sup>3</sup> *Sutton v. Johnstone*, *ut supra*.

<sup>4</sup> Vol. I. p. 172.

<sup>5</sup> As to Naval Courts, Chap. III. par. 8, *ante*.



receive pay as a Soldier." Wages, or civil salary, would not create such a liability. The receipt of pay fixes the Military character upon the recipient, to disprove which he must procure his release by a regular discharge. Nor is his liability affected by the fact that he is a subject of a Foreign State.<sup>1</sup> On referring to the 2nd Section, it will be seen, that this liability is often imposed by the use of generic terms, as "persons commissioned," or in "pay" as "Officers" or "Soldiers," or "Officers or persons serving in the Control Department." Parliament, therefore, has confided to the Crown the responsibility of selecting those officials, who in regard to their duties, whether Civil, Financial, or Military, should be placed under the Military Code.

28. The primary test of this liability is Statutory enactment; and then holding such an appointment, or receiving such pay from the Crown as to bring the holder within the designation, or class of persons made liable to the Act. However, for many years (from 1744 to 1828) the Articles of War<sup>2</sup> declared all "Sutlers and Retainers to a camp to be subjected to the rules and discipline of War," though it was clear from the Law Officers' Report in 1744-5 that they could not be punished by Court-martial, because they were neither designated in the Act nor were they Officers or Soldiers. Had the Crown seen fit to commission or enlist—or even to pay them "as Officers or Soldiers"—this liability would then have attached<sup>3</sup> to them.

29. The expression of Lord Campbell's opinion, as given in *Wolton v. Gavin*,<sup>4</sup> had reference to this express Statutory liability, and should be received with some caution. No doubt the original intent of Parliament was to limit the operation of the Military Code to the Combatant part of the Army; and for many years the Act was so worded as to include only Officers and Soldiers, viz., that class who, according to Mr. Windham's definition, "live in bodies by themselves—not fixed to any spot, nor bound to any settled employment—who neither toil nor spin,

<sup>1</sup> Vol. i., Adm. Op.; L. O. p. 495 (Admiralty) on the liability of an Impressed American. 24th July, 1797.

<sup>2</sup> Sec. 14, Art. 23 of 1749, and Sec. 24, Art. 3 of 1828.

<sup>3</sup> *Grant v. Gould, sup.* By the Military Manœuvres Act (which is annually passed) licensed victuallers are made subject to the Mutiny Act (see 35 & 36 Vic. c. 64, sec. 13).

<sup>4</sup> 16 Q. B. Rep. 61.

whose home is their regiment, and whose sole duty is to encounter and destroy the enemies of their country," but it can scarcely be truly asserted that this is so now. "I am most anxious as a Constitutional Judge," Lord Campbell declared, "that it should be fully understood to be my opinion that none are bound by the Mutiny Act except Her Majesty's Forces."<sup>1</sup>

30. From what has been already written, the reader, perhaps, need not be cautioned against supposing that all those who are resident or commorant within the Camp or Barrack are thereby rendered liable to trial by Court-martial. Such a liability must be found upon the Statute Book in plain and explicit words, leaving nothing to inference. "Any Statute which takes away the right of trial by jury and abridges the liberty of the subject must," said Chief Justice Best, "receive the strictest construction," so that "nothing should be holden to come under its operation that is not expressly within the *letter* and the spirit of the Act."<sup>2</sup>

31. This liability must also be existent: (1) When the offence was committed—for the Mutiny Act has no retrospective operation, and (2) when the offender is arrested—for, as a general rule, his liability to the Military Code, unless prescribed by Statute, ceases with his military engagement for service.<sup>3</sup> If these objections exist, neither of them can, I apprehend, be cured by the offender's consent or acquiescence in the jurisdiction of the Military Tribunal.<sup>4</sup>

32. Whether an Officer or a Soldier "on leave" or furlough continues liable to the Act has not (that I am aware of) been ever authoritatively decided.<sup>5</sup> The question appears to have

<sup>1</sup> Vol. II. p. 37.

<sup>2</sup> *Looker v. Halcomb*, 4 Bing. Rep. p. 189.

<sup>3</sup> Vol. I. p. 186.

<sup>4</sup> See Vol. i. Attorney-General's Opinions, 1820, Wirt, p. 383; Vol. vi. *ib.* 1853, Cushing, p. 239. *Andrews v. Elliott*, vi. *ib.* p. 338; *Vansittart v. Taylor*, 4 Ell. and Bl. p. 912; vol. ix. Attorney-General's Opinions, 1858. Black, p. 184. Chap. vi. par. 79. In America it has been held that appearing and pleading guilty is an admission of Jurisdiction, and a waiver of error. *Vanderheyden v. Young*, 11 John, 158; *Johnson v. Hunt*, 13 *ib.* 186; but see *contra*, *Duffield v. Smith*, 3 Serj. and Law, 600; *Shoemakers v. Nesbit*, 2 Rawl. Rep. 203.

<sup>5</sup> Mr. S. Percival advised the Admiralty (1st March, 1799), that a sailor was not liable to Court-martial for offences committed by him when absent without leave, as not being then "on actual service." Vol. ii. Ad. Op. 71. Nor was an officer liable after the loss of his ship, and before trial for the same. *ib.* 255, vol. iii. *ib.* p. 625.

been discussed in September 1831 at the Board of Admiralty, and a doubt entertained whether an Officer on leave could be tried by a Court-martial for a Military offence;<sup>1</sup> but in 1856 the late Sir W. Atherton advised that a sailor on leave could be tried for desertion. In Lieutenant Poe's case,<sup>2</sup> the misconduct of which a Court-martial had convicted him happened when he was returning home on leave as a passenger on board the 'Casar;' but no objection that the sentence was illegal on that ground was taken before the Court of King's Bench.<sup>3</sup> An Officer<sup>4</sup> unemployed, and on half-pay,<sup>5</sup> cannot be tried by Court-martial, except for offences committed when in full pay.<sup>6</sup>

33. An Officer suspended remains liable to the Mutiny Act; but "Whether an Officer, having been dismissed from His Majesty's service, and having no military employment, is triable by a Court-martial for a Military offence lately committed by him while in actual service and pay as an Officer," was the question submitted to the Judges in Lord George Sackville's case, and their answer (of the 3rd March, 1760)<sup>7</sup> was in the affirmative. It would, however, be scarcely safe to rely on this ruling at the present day. Any one not an Officer or Soldier placed upon his trial by Court-martial at his own request is not thereby made amenable to Military Law; for if the Court have not jurisdiction, it is clear that such cannot be obtained by the Prisoner's consent or agreement to be bound by its Sentence.

34. Foreign troops, unless specially named, are not liable to the Act, and when the Hanoverian troops came to this country under the orders of George II., the Secretary at War was advised that the King had no power over them under the Mutiny Act or Articles of War. As the Commander-in-Chief, the King might order deserters to be sent to their corps, either here or abroad, but he could do no more.<sup>8</sup>

<sup>1</sup> Vol. iv. Ad. Op. p. 233.

<sup>2</sup> Vol. I. p. 183.

<sup>3</sup> Sullivan, p. 87.

<sup>4</sup> Nor on parole until exchanged, Maltby, p. 35.

<sup>5</sup> Vol. I. p. 178.

<sup>6</sup> Vol. i. Ad. Op. p. 483; L. O. (Percival) to Ad., 22nd November, 1796.

<sup>7</sup> Maltby, p. 35, and see Captain Norris's case in 1744, Vol. i. M<sup>r</sup>Ar., p. 430, and 13 Parl. Hist. p. 1260; Vol. I. p. 182.

<sup>8</sup> Vol. I. p. 188.

35. Lord Hale lays it down that if an alien<sup>1</sup> enemy comes into the kingdom hostilely to invade it, he shall, if taken, be tried by Martial Law as an enemy, and not by the Common Law Courts as a traitor. This rule appears to have been acted upon by William III. ; for the Court-martial Books contain an entry (under date 18th April, 1695) of a Warrant for the formation of a Court-martial for the trial "of Tobias Le Roy, *alias* Berke, lately come out of France, with a commission from the French King, whose subject he owns himself to be, so that he might be justly deemed to be a spy, and to have treacherous designs against our Person and Government." The Court was authorized to try the accused, and, if guilty, to give final judgment for his condemnation and punishment by death, corporal punishment or otherwise, as by the rules and methods of war and the military laws of nations on that behalf ought to be inflicted.<sup>2</sup>

### 36. II. As to the Offences.

Anterior to the passing of the Mutiny Act, the Sovereign had assumed the power, though the Petition of Right had protested against it, of protecting his Soldiers from the ordinary consequences of their improvidence or crimes :—

Thus in legal matters (1) of Criminal Offence, to refer the consideration thereof in the first instance to a Court-martial for report, and then, on its report being presented to the Sovereign, to do justice as he deemed fit between the Soldier and Citizen, and (2) of Civil<sup>3</sup> Proceedings for the Recovery of Debts, to hold the same in abeyance by orders to the Sheriff. That no sanction whatever might be given to this assumption or to the theory that the Soldier—as then made legally subject to the Military—was not liable to the Ordinary Tribunals of the Realm, the Act made the Common Law supreme, by declaring "that nothing therein contained should extend or be construed to exempt any Officer or Soldier whatsoever from the ordinary process of Law."

<sup>1</sup> In *Elijah Clark's* case the man not being an alien was, though convicted by Court-martial, discharged by the President of the United States as a citizen not liable to Court-martial trial.—Maltby, p. 36. *Smith v. Shaw*, 12 John Rep. 260.

<sup>2</sup> Vol. I. p. 188. Spies by the N. D. A. (Sec. 6) are made liable to that Act. As to the trial or summary execution of prisoners of war breaking parole, see App. K.

<sup>3</sup> Vol. I. p. 55.

This fundamental rule has, however, been infringed by the Military Code, both in respect to (1) the punishment for ordinary criminal offences, and (2) for the recovery of civil debts in the manner, and for the reasons to be here mentioned.

37. (a.) As to Criminal Offences.<sup>1</sup>

The 18th Article of War (1717) ordered the Commanding Officer of every Regiment to give up to the Civil Magistrate, for trial, the person accused of any crime punishable by the known laws of the land, *and* not expressly mentioned in the Articles; assuming that Courts-martial had pre-ordinate jurisdiction in all cases of offences mentioned in the Articles of War. The Mutiny Act<sup>2</sup> also gave the accused the benefit of his Court-martial acquittal before the Civil Courts, by declaring such acquittal to be a full bar to any indictment or proceeding for the same offence before a Civil Tribunal. The jurisdiction thus assumed by Courts-martial to try offences (of immorality or misbehaviour) committed by a Soldier against a fellow-citizen was calculated so to obstruct or supersede the ordinary Tribunals, that many grievous offences remained unpunished.<sup>3</sup>

38. The Remedy for this usurpation of Judicial authority was commenced by Parliament declaring in the Mutiny Act of 1718, 1st, that any Soldier accused of a Criminal offence punishable by the known Laws of the land should be given up to the Civil Magistrate by the Commanding Officer, under the penalty of his being cashiered for neglect or refusal;<sup>4</sup> and 2nd, that no person convicted by the Civil Magistrate should be liable to Court-martial punishment, save that of cashiering, for the same offence.<sup>5</sup> It was completed in 1721, when the clause giving the accused criminal the full benefit of Court-martial acquittal was withdrawn from the Act.

39. However, in the interest of discipline, if not of morality, an exception to the fundamental rule was made by the Articles of 1717,<sup>6</sup> which has been continued, and is still found in the Military Code.<sup>7</sup> It was provided in Gibraltar, and in

<sup>1</sup> As to power of Naval Courts, see Chap. III. par. 1, *ante*.

<sup>2</sup> 4 Geo. I. c. 3, s. 41.

<sup>3</sup> See Lords' Protest, Vol. I. p. 159.

<sup>4</sup> *Ib.* p. 508, Rep. of 1721.

<sup>5</sup> *Ib.*, p. 160.

<sup>6</sup> 18 Com. Journ. p. 713.

<sup>7</sup> Sec. 99 and 101 of the M. A., Art. 143-5 of War, as to India.

ther foreign stations where the Army was quartered, and 'where there was no form of Civil Judicature in force, that the Generals or Commanders should hold General Courts-martial and punish Criminals by their sentence, as had been practised theretofore and authorized by former Articles of War':—a power which assumed a more definite shape in 1750, when these Articles<sup>1</sup> gave the same Court jurisdiction "to try all persons guilty of Wilful Murder,<sup>2</sup> Theft, Bobbery, Rape, Coining<sup>3</sup> or Clipping<sup>4</sup> Coin, and all other Capital Crimes or other Offences, and to punish Offenders as the nature of their Crimes should deserve." The Articles of 1784 somewhat altered this language by giving Jurisdiction if a person was "accused" (though possibly not "guilty") of the Crimes enumerated in both Articles, and "of having used violence, or committed any offence against the person or property of any of our subjects, or of any others entitled to our protection." The sentence of death was also authorized, with a discretion given to the Court<sup>5</sup> of awarding such other punishment as the nature and degree of the offence appeared to justify.

40. Such continued to be the Law and the chief exception to it until the extreme difficulty of punishing Soldiers for Civil Offences in the Field by summoning a full General Court-martial was represented during the Peninsular War by the Duke of Wellington.<sup>6</sup> Parliament, therefore, in 1813, passed a special Act<sup>7</sup> giving additional Power for the punishment of such Crimes by enabling a Commanding Officer serving out of the Dominions of the Crown, on receiving a Complaint of any Crime or Offence committed against the person or property of any inhabitant or resident in such Country by any person serving with or belonging to the Army in the Field, to summon a Detachment General Court-martial of not less than three Officers for the trial of such Offender, and to award against him such punishment as the Mutiny Act or Articles of War

<sup>1</sup> Sec. 19, Art. 2.

<sup>2</sup> Murder in Placentia in 1733, Vol. I. p. 529.

<sup>3</sup> As to coining in Flanders in 1736. Vol. I. pp. 533, 534.

<sup>4</sup> As to clipping at Ghent, 1745, Vol. I. p. 535.

<sup>5</sup> See the case of King v. Suddis, 1 East. Rep. p. 310; on this Art., Sec. 22, Art. 4 of 1784, and Sec. 21 Art. 4 of 1800. As to the East Indies, see 101 of the M. A., *post*, and 14 (Supp.) Desp. 421.

Correspondence printed; and Vol. II. p. 666.

<sup>7</sup> 53 Geo. III. c. 99.

prescribed. This enactment was incorporated in the Mutiny Act<sup>1</sup> of 1814, and remains upon the Statute Book.

41. In the interest of discipline one other exception, first made in the Articles of 1742, has been continued to the present time. In the earlier Code<sup>2</sup> it was provided that "every Non-commissioned Officer or Soldier found guilty by a Regimental Court-martial of pilfering and stealing his comrades' or other Soldiers' clothes, arms, or accoutrements, should be put under weekly stoppages to replace the same, and suffer such confinement or corporal punishment as the Court should award." This was incorporated into a later Mutiny Act, and in that of 1833<sup>3</sup> was extended to the property of an Officer or a Military Mess, and generally to petty offences of a felonious or fraudulent character, to the injury of, or with intent to injure, any person, Civil or Military; the Jurisdiction being by the same Act transferred to a District Court-martial. In 1847 the word "petty" was omitted, under the advice of the late Mr. Charles Buller—which gave the Jurisdiction of the Court-martial a wider application than was originally intended. A General Order was, therefore, issued in November 1851, that a Court-martial should be had recourse to "only where the Civil authorities declined or omitted to prosecute, or where from circumstances, which render it difficult to bring the case before the Civil Courts, it may be necessary for the ends of Justice and the maintenance of discipline to resort to trial by Court-martial." In 1860, this power was transferred to the Articles of War, and these were altered in 1862<sup>4</sup> as they now stand.<sup>5</sup>

#### 42. (b.) As to the recovery of Civil Debts.

The arrest of the Soldier for debt involved different considerations. In the first place, where Conscripts had been impressed, or Felons (to escape the punishment of death) or Insolvents (that of perpetual imprisonment) had entered the Army, it was important to society to keep them there. On the other hand, men (then as now) might enlist into the Service

<sup>1</sup> 54 Geo. III. c. 25, and Sec. 12 of M. A. 1873.

<sup>2</sup> Sec. 9.

<sup>4</sup> Art. 85.

<sup>3</sup> 1742, Art. 41.

<sup>5</sup> Art. 81.

with no other object in time of Peace than to escape the legal consequences of pecuniary embarrassment; and the enlistment, with unlimited furlough, might be fraudulently urged against the honest claims of creditors. The action of Parliament was directed to these ends, to prevent the Soldier first from being trusted, by ordering his Officer to cry down his financial credit in each town which the Regiment entered, and afterwards from being taken out of the Army (by those who had wrongfully trusted him) to the injury of the Public Service.<sup>1</sup> Thus the 3rd Act of George I. (1715) declared that no "volunteers" should be taken out of the Army by any process other than for Criminal matters, and the Act of 1717<sup>2</sup> authorized any Justice to discharge such prisoners from arrest without the payment of any fee.

43. As applied to "volunteers" only, society was safe from the release of Convicts or of imprisoned Debtors; but it placed every Soldier out of the reach of Law in regard to making any pecuniary compensation for torts committed or for any other legal obligations contracted by him. The Lords made this grievance a subject of "protest,"<sup>3</sup> and Parliament endeavoured to meet the difficulty in both aspects, first by enabling just debts to be recovered, and then by preventing the Soldier from being withdrawn from the Army by an arrest fraudulently arranged with a conniving Creditor. The Act of 1717<sup>4</sup> accordingly provided that the debt or damages should amount to £10 at the least, and be proved on oath. This principle of exemption—extended both to the amount and nature of the obligation as well as the persons entitled to it—has been continued in the Mutiny Act though it may be questioned whether, in regard to the present necessities of the Military Service, the exemption be either needed or ought to be countenanced by the State.<sup>5</sup>

44. But here (as in the case of crime abroad, and for the same reason) an exception to the ordinary Law has been created, and a jurisdiction in recent years has been given to a Tribunal of Military Officers to adjudicate on the Civil claims of Creditors against the Officers and Soldiers of the Army serving in India.

<sup>1</sup> Vol. I. p. 208.<sup>2</sup> Vol. I. p. 209.<sup>3</sup> Vol. I. p. 209.<sup>4</sup> Geo. I. c. 31, s. 17.<sup>5</sup> Vol. I. p. 211.



In the year 1823 such a provision<sup>1</sup> was made for the recovery of debts not exceeding 400 sicca rupees before a Military Court of Requests where the Army was quartered beyond the jurisdiction of the Civil Court established for Calcutta, Madras, and Bombay, and these Clauses transferred (from a subsequent<sup>2</sup> Act) stand part of the present Military Code.<sup>3</sup>

45. But to revert to the Jurisdiction of Courts-martial over Military Offences declared such by statute. These observations may be affirmed. In any question of construction arising upon the Mutiny Act, it must be remembered that the intention of the Act should be plainly declared, "for every penal clause must be interpreted strictly, and not be extended by construction."<sup>4</sup> The offence must have been committed within the period limited—three years. The Law Officers, in 1718, advised the Crown that the expiry of the Annual Act did not prevent the trial and punishment of the offender under a succeeding one, and in the one of 1760 the limitation<sup>5</sup> of three years was inserted. The offence must neither have been punished<sup>6</sup> nor condoned.<sup>7</sup> "The performance of a duty or honour or of trust after the knowledge of a Military offence committed ought," wrote the Duke of Wellington, "to convey a pardon,"<sup>8</sup> and, according to his practice in the Peninsula

<sup>1</sup> 4 Geo. IV. c. 81, secs. 57, 58.      <sup>2</sup> 20 & 21 Vic. c. 66, s. 67.      <sup>3</sup> Sec. 99.

<sup>4</sup> Lord Tenterden in *Proctor v. Mainwaring*, 3 B. and Ald. p. 147.

<sup>5</sup> Vol. I. pp. 508, 517. In the Navy three years from the commission of the offence, or one year after the offender's return to the United Kingdom. Sec. 54 N. D. A.

<sup>6</sup> After this period the law (as laid down in America) is that the Court-martial has no jurisdiction, and the defendant's consent to trial would not avail. Vol. I., Attorney-General's Opinions, 1820; Wirt, p. 383; Vol. vi. *ib.*, 1853; Cushing, p. 239; 1854, p. 507. Sir James Wallace so advised the India Office in April 1781 (No. 288 of India Office Cases).

<sup>7</sup> A C. O. having punished cannot after order a C. M. trial. L. O. (Ady.) 18th March 1808, Vol. ii. Ad. Op. 249.

<sup>8</sup> Sec. 6, par. 32 of Queen's Regulations, Sept. 1873:—"No Non-commissioned Officer or Soldier who has been placed in arrest or confinement ought to be permitted to perform any duty (except carrying his own arms and accoutrements in marching) until his case is disposed of. If, however, by error, such an offender has been permitted to perform any duty, he shall not thereby be absolved from liability to punishment for his offence, but may, if the proper authority shall think fit, be summarily punished, or be brought to trial before a Court-martial, according to the circumstances of the case."

<sup>9</sup> *Ibid.*

it did do so. "No man should be put on duty with a Court-martial hanging over his head."<sup>1</sup> The discharge of duty involves condonation; and if the Crown, with a full knowledge of an offence, permits an officer to resign his commission, that would, I apprehend, be such a condonation, that he could not be put upon his trial before a Court-martial.<sup>2</sup>

46. One distinguishing feature of Court-martial Jurisdiction is that it is not Local, for Crime which is Local under the ordinary rule of Law is not so under the Military Code.<sup>3</sup> Military (but not Civil) Crime may, therefore, be committed in one, informed against in another, tried and punished by Court-martial in a third Colony or place,<sup>4</sup> or the prisoner<sup>5</sup> or the members of the Court<sup>6</sup> may be sent for his trial from this country to the place where the offence was committed. "The Military Code operates against offenders," wrote Sir Charles Gould<sup>7</sup> in 1753 (and the Mutiny Act<sup>8</sup> has since been framed so as to accord with his opinion), "not as inhabitants of this or that particular district, but as Soldiers in His Majesty's Service, having as such no stated commorancy; therefore His Majesty's Forces may be considered, however dispersed, as members composing one body, regulated by peculiar Laws, and altogether distinct from the province in which they are eventually stationed."<sup>9</sup>

<sup>1</sup> Vol. vi. Desp., p. 414, and Vol. iv. p. 593, and G. O. 11th February 1811, and 16th May 1817. A different rule prevails in the Navy; an officer may be ordered "on duty without prejudice to his future trial," Ad. Reg. p. 105.

<sup>2</sup> Vol. ix. Attorney-General's Opinions, 1858, Black, p. 184. <sup>3</sup> Vol. I. p. 187.

<sup>4</sup> Colonel Crawley was tried at Aldershot by a General Court-martial summoned by the Commander-in-Chief, and honourably acquitted of alleged wrong committed in India. P. P. 96, 4 March 1864.

<sup>5</sup> See Admiral Stirling's Case, where the L. O. advised the Admiralty to send him to Jamaica for trial, 5th November 1813.

<sup>6</sup> In 1866, a Special Court was sent from England, who fortunately acquitted the prisoners, Cullen and Morris.

<sup>7</sup> Vol. I. p. 539.

<sup>8</sup> 1770, 10 Geo. III. c. 6, sec. 58; 1815, 55 Geo. III. c. 108, sec. 29; 1829, 10 Geo. IV. c. 6, sec. 5; 1872, 35 Vic. c. 3, sec. 7; *Re Blake*, 2 M. and Sc. p. 128.

<sup>9</sup> Where the Court is exercising special jurisdiction over local offences under delegated Statutory authority, this (as the Crown was advised in 1733) must be done within the limit where both such jurisdiction exists and the crime was\*

\* L. O. Reports, vol. i. p. 529.

47. In contradiction to this doctrine, it is said, that Military Authority cannot be exercised and enforced by Court-martial Jurisdiction in a Foreign Country, unless the Army be in hostile occupation of it. In many instances, affecting the life, limb, or personal liberty of the offender, this may be found practically to be the case—arising, however, from the action of the Civil Tribunals of that country, and not from any exception to the rule as laid down in the last paragraph. Should our Army be passing through a Neutral State, the condition imposed upon this innocent passage would be the observance of a strict Military discipline<sup>1</sup>—a condition which could not possibly be observed by the General in Command, unless the Neutral State, by the non-interference or otherwise, of its Legal Tribunals upheld his authority and the Jurisdiction of our Courts-martial<sup>2</sup> to enforce such discipline. On the other hand, it is easy to suppose that Independent States would generally refuse to recognize our right to arrest and punish as Military Deserters those who may be otherwise commorant within their territories.<sup>3</sup>

48. One exception to this rule—that a Military Offender may

committed. The question whether the *Lex loci* or of England should govern the reception of evidence by a Court-martial is discussed in Simmons, par. 810, but the better opinion appears to be “that the Mutiny Act neither expressly nor by necessary implication requires Courts-martial to follow the English law of evidence,” Book III. p. 119. As to Naval Courts, see Chap. II. par. 57.

<sup>1</sup> As to this, see Lord Stowell's remarks in “*The Twee Gebroeders*,” 3 Ch., Rob. Rep., p. 352; Wheat. ‘*International Law*,’ part iv. chap. 3, sec. 8; Halleck, chap. xxi. par. 5; Twiss, ‘*Law of Nations (War)*,’ sec. 218; Phillimore *Inter. Law*, Vol. i. p. 336, ed. 1873. The Army in Portugal was of course (as to Military Crime) governed by our Courts-martial; but when Civil Crime (such as Murder) was committed, the Duke sent the offender for trial before the Local Civil Courts. “My opinion is,” wrote Wellington, of a Soldier who had committed Murder, “that he, and all guilty of similar offences, ought to be tried according to the Laws of the Country; but, if the [Portuguese] Government prefer that we should take cognizance of these offences as being of a Military nature, we will do so at once in every case, but they must assist us in obtaining Witnesses to come forward and give their testimony on oath.”—Vol. iii. *Gur. Desp.* p. 350. See also pp. 461-462, where the Law was to take its course; and in January, 1811, where he orders a Soldier to be given over to the Civil tribunals to be tried for the murder of a woman, vol. iv. *ib.*, p. 502. Vol. xiv. (Supp.) *Gur. Desp.* p. 189 and G. O. 13th May 1813. The question raised in this paragraph came before me when the Guards' Band went to America in June 1872, 211 H. D. (3) p. 987. 1510. <sup>2</sup> Story's *Conflict*, sec. 38. <sup>3</sup> Forsyth's *Cases*, p. 468.

be tried in any place—must be made in the case of Troops serving as Marines and sailing as passengers on board Her Majesty's Ships of War in Commission. In July, 1795, the question appears to have arisen from the Officers of the Navy claiming paramount authority over everyone within the Ship, and that every Offender against discipline should be tried by Naval Officers forming a Court-martial under the Navy Discipline Act. Lieutenant Fitzgerald was, therefore, placed upon his trial before a Court so formed "for having behaved with contempt to the Captain of his ship, his Superior Officer, when in execution of his office." He refused to plead or to recognize the authority of the Court; but he was sentenced by the Court to be dismissed from His Majesty's Service, and to be rendered incapable of ever serving His Majesty in any Military capacity.<sup>1</sup>

49. This case, unless promptly disposed of, was likely to give rise to animosity between the two Services, therefore an additional Article of War (now the 191st), and the instructions contained in a Letter from the Duke of York to General Sir R. Abercrombie (printed in the Appendix,<sup>2</sup> p. 309), were promulgated to the Army on the 24th and to the Navy on the 28th October 1795. Against these arrangements a protest was made by the Admirals of the Fleet. The Soldiers serving as Marines were withdrawn from the Ships, but these disciplinary arrangements remained without modification. Whenever the two Services came into united action,<sup>3</sup> the different Officers in Chief Command were ordered to govern themselves by the Articles of War and Admiralty Instructions of 1795.

50. As the Articles of War were silent as to the Jurisdiction of a Military Court-martial on board ship,<sup>4</sup> Colonel Talbot—probably ignorant, in 1800,<sup>5</sup> of the Regulations of 1795—held a Regimental Court for the trial of a Soldier on board a Man-of-war. This was made a subject of complaint on the part of the Admiralty; whereupon a General Order of the 19th April 1800, was issued, declaring that holding a Military Court-

<sup>1</sup> Vol. i. M'Ar. (1813), p. 408. The C. M. had no Jurisdiction, Vol. I. Ad. Op. p. 403.

<sup>2</sup> Page 309.

<sup>3</sup> See Private and Confidential of July 1810, by the Admiralty and Commander-in-Chief to Naval and Military Officers.

<sup>4</sup> This original Article is pasted on to the MS.

<sup>5</sup> Vol. i. M'Ar., p. 43.

martial on board His Majesty's Ships of War was contrary to the rules and discipline of the Navy, and on no account to be practised. All measures of that nature were to be suspended till the embarkation of the Troops; but that such summary punishments as might be needful should be inflicted under the authority of the Naval Officer.

51. The arrangements at present in force are these:—The Naval Discipline Act, 1866,<sup>1</sup> brings all Military Officers and Men, while on board such ships, under that Act “to such extent and under such regulations as any Order in Council shall direct; and such an Order, recently issued (Appendix H), declares that when the Army is embarked to serve as Marines, they shall be treated as such; and when as passengers, they shall conform to the discipline of the Navy, and consider themselves under the command of the Senior Naval Officer. The power of awarding therefore, passes away from the Military to the Naval Officer, and unless summary punishment by the Naval Officer, with the concurrence of his own Officer, be inflicted, the Prisoner is removed from the ship for trial by a Military Court-martial.

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<sup>1</sup> 29 & 30 Vic. c. 109, sec. 88, and Art. 191 of 1870.

## CHAPTER VIII.

THE INITIATION OF LEGAL PROCEEDINGS BY THE ARREST OF  
THE OFFENDER.

1. FROM what has been written, the reader will be prepared to enter upon the consideration of the practical application of Military Law to correct the offences against discipline committed by the Officers and Soldiers of the Army. Some outline of the Military system has been already given, but such detail must here be added as will render this Chapter one of practical utility; and as no reader can be supposed to be ignorant that every member of the civil community is amenable to the Criminal Law through the established agencies of the Civil Police and Legal Tribunals, so it will be my first purpose to explain through what Military agency and by what Military Tribunal every offender against the laws of the Army is brought to Justice.

2. The discipline, as incident to the Command, of the Army is vested in the Sovereign.<sup>1</sup> Unity is the very essence of Military Command;<sup>2</sup> and therefore all authority—passing though it may do through many subordinate channels—is derived from only one source, viz., the Crown. The primary agent in whom all disciplinary powers are vested is the General appointed to the Chief Command, whose authority is paramount over the Army. In the ordinary discharge of this duty, his orders are as we have shown conveyed to Generals in subordination to him; but in theory his authority permeates throughout, and the transcendent nature of his power over the Army cannot perhaps be

<sup>1</sup> As to the Navy, Chap. III. par. 6.

<sup>2</sup> Bruce, p. 139, and see Mr. Burke's affirmation of the same principle—as one of political expediency—quoted Vol. II. pp. 36 and 147.

better expressed than by using as an illustration of it the legal maxim, "In præsentia majoris cessat potentia minoris."

3. In all matters of discipline the executive Officer of the Commander-in-Chief is the Adjutant-General, who, to borrow a phraseology familiar to legal minds, it is no exaggeration to say, is the "hand and mouth"<sup>1</sup> of the General. "His name denotes his charge and office."<sup>2</sup> All controversies or offences, involving the interference of the Commander-in-Chief, are submitted through him for decision. Her Majesty's Regulations for the general observance of the Army are issued under his imprimatur. The ultimate appeal, whether an offending Officer shall be brought to trial or released from arrest, is determined upon his advice.

4. The Consultative Officer and Legal Adviser of the Commander-in-Chief is the Judge Advocate-General.<sup>3</sup> "No Military accusation should be preferred which cannot be maintained," for such a practice if resorted to would (as the Queen's<sup>4</sup> Regulations declare) be "both highly inconvenient and injurious to the Service; therefore, the charges should be settled and the evidence arranged by the Judge Advocate-General in all doubtful cases before the prisoner's arraignment."<sup>5</sup> "He must be a lawyer," wrote Turner,<sup>6</sup> "to inform the Court what the Civil and Municipal Law provides," and that the Military may not infringe upon the jurisdiction of the Civil Courts; but he "has<sup>7</sup> no judicial power, nor any determinate voice either in

<sup>1</sup> "The seal," said Chief Justice Tindal, "is the hand and mouth of a Corporation." *Gibson v. E. I. Co.*, 5 Bing. N. C. p. 269. Death Warrants were signed by the Adjutant-General for the Duke of Wellington. Vol. xiv. Suppl. Desp. 318-20. As to the general relationship of Staff to General Officer see vol. iv. Well. Desp. (1827), p. 129. But the General Officer himself should correspond with the Head Quarters. Vol. xiv., Suppl. Desp. 545.

<sup>2</sup> Turner in 1671: "He is the helper to General Officers. The orders and directions he gives are not to be looked upon as his own, but the General's; therefore his person must be known to both officers and men of the whole Army." P. 249.

<sup>3</sup> The history of the office is traced in the Articles of War in Chaps. I. and II. *ante*, in par. 17 and Chap. IX. par. 13, *post*, and in Vol. II. chap. xxvii.

<sup>4</sup> Sec. 735 of 1868.

<sup>5</sup> Evidence before C. M. Com. (Mr. Lushington), *passim*.

<sup>6</sup> *Pallas Armata*, p. 287.

<sup>7</sup> Tytler's Essay (1814), chap. xiv. p. 353. In the Navy the Counsel to the Admiralty advises the Board, and refers where need be to the Law Officers of

the sentences or interlocutory opinions of the Court."<sup>1</sup> In a Court-martial all the Judicial power (as will be seen hereafter) is vested in the convening Officer and those who are sworn duly to administer justice according to the Military Code, and "if any doubt arise according to their conscience and the custom of War in like cases;" but that the authority of the Court may not be overthrown after the sentence by any legal quibble or technicality urged by the prisoner, the advice and direction of the Judge Advocate-General is taken on the initiation of the proceedings.<sup>2</sup> Nor is he more than a subordinate officer;<sup>3</sup> for the terms of his appointment require him "to observe the orders which he shall from time to time receive from the Commander-in-Chief;"<sup>4</sup> much as formerly the Royal Sign Manual Warrants required him to observe all the orders of the Board of General Officers appointed by the Crown for Army affairs.<sup>5</sup>

#### 5. As the power<sup>6</sup> of summary Punishment in time of Peace

the Crown. The personal Government of the Army by the Crown in former days made the Judge Advocate for the Army a greater official than his compeer at the Admiralty.

"The office of Judge Advocate-General is not in any sense judicial, but ministerial. His duty is to give advice, not pronounce judgment."—L. O. (1873), Book I. p. 72.

<sup>1</sup> The suggestion that the Judge Advocate-General should be released from all responsibility except that of quashing the proceedings and annulling the Findings or Sentences of Courts-martial for irregularity would, if adopted, be most mischievous to Military Discipline. These incidents occurred in 1863 after the Mhow Court-martial, for the benefit of Paymaster Smales and were followed by Col. Crawley's trial and honourable acquittal—experiments which should not be repeated. (Chap. VI. pars. 16, 17, *ante*.) <sup>2</sup> Vol. II. p. 746.

<sup>3</sup> See his Orders issued to J. A. Grant in holding Somerville's Inquiry in July 1832, 27 Vol. PP. p. 443.

<sup>4</sup> Note 1 to Chap. XII. par. 4.

<sup>5</sup> The only disciplinary powers of Punishment appear by the Queen's Regulations to be as follow:—

Sec. 6, Discipline.—12. "In order to secure uniformity of system, Commanding Officers are authorized to award the undermentioned Punishments for such offences only as they may not deem necessary to bring under the cognizance of a Court-martial, viz.:—

"(a.) *Imprisonment or deprivation of pay*, or both, to the extent authorized by the Mutiny Act and Articles of War. In the Royal Engineers, forfeiture or reduction of the several rates of working-pay may, in certain cases, be awarded.

"(b.) *Confinement to barracks* for any period not exceeding twenty-eight days, which carries with it punishment drill to the extent of fourteen days, the taking



which the Articles of 1717<sup>1</sup> permitted the Commanding Officer<sup>2</sup> to inflict, has long ceased, the first step towards bringing an offender to Justice under the Military Code is to order his arrest or confinement. As preliminary thereto, the Commanding Officer, before ordering it, should satisfy himself whether the accused is a person who was (1) subject to the Code when the offence was committed and at the time of his

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all duties in regular turn, attending parades, and being further liable to be employed in duties of fatigue, at the discretion of the Commanding Officer. Every award of confinement to barracks for fourteen days and under, is to carry with it punishment drill, which in the mounted services is to be 'kit drill,' and in the infantry 'marching order.'

"(c.) *Confinement to barracks for twenty-eight days without punishment-drill, for concealing disease; with or without an entry in the Regimental Defaulter Book at the discretion of the Commanding Officer.*

"(d.) *Extra guards or piquets; but these are never to be ordered as a punishment except for minor offences or irregularities when on, or parading for, these duties.*

"13. Imprisonment is, as much as possible, to be reserved for cases of drunkenness, riot, violence, or insolence to superiors, and shall precede any further punishment that may be inflicted of confinement to barracks, and extra drills, it being understood that any single award of punishment—including imprisonment—is not to exceed twenty-eight days. Should a soldier, while undergoing any of the punishments sanctioned by the foregoing paragraph, again commit an offence for which summary punishment may be awarded, he may be awarded a further sentence of confinement to barracks, to commence, if his Commanding Officer shall so order, at the expiration of the previous sentence, although such sentences taken together exceed 28 days; provided that no soldier shall be confined to barracks continuously for more than 56 days in the aggregate. Should the fresh offence be committed while the soldier is undergoing imprisonment, additional imprisonment for such fresh offence may be awarded, to commence at the expiration of the imprisonment already awarded; provided that such periods of imprisonment taken together shall not exceed the term (168 hours) authorised by the Articles of War. Should a soldier already awarded imprisonment with confinement to barracks commit another offence after the completion of the imprisonment, but before the completion of the confinement to barracks, he may again be awarded imprisonment to commence at once, and to reckon concurrently, as far as may be, with the confinement to barracks.

"14. Punishment drill; which is to consist of marching only, and not of instruction drill, is not to exceed one hour at a time, and under no circumstances is it to exceed four hours altogether in the same day. It is to be carried on in the barrack-yard or drill-ground, and when regiments or detachments are in billets, and have not such accommodation, then defaulters are not to be exposed to ridicule by being drilled in the streets, but they are to be marched out on one of the public roads for the prescribed period, under charge of a Non-commissioned Officer."

Fines may also be imposed for drunkenness, by subsequent pars. in the same Section.

<sup>1</sup> Arts. 35 and 40.

<sup>2</sup> As to summary power of a Naval Commanding Officer see N. D. A. sec. 56, Ad. Reg. p. 115.

arrest; and if so, (2) whether the offence is one for which he can be punished under the Military Code.

6. The channel for, or agent in, the arrest is usually the Adjutant either of the Regiment or of the General (according to the nature of the offence or the status of the offender); but with the exception mentioned in the next paragraph, the authority is always superior, and is usually that of the prisoner's Commanding Officer.<sup>1</sup> The external order of a Camp or Barrack may in some measure be said to be left in the hands of the Military Guard or Sentry posted in and around it by the Adjutant, for "The Adjutant is to a Regiment," wrote Adye, "in many respects what a Sheriff is to a County: he is the person who is to superintend the execution of every Judgment, and the inflicting of every Punishment."<sup>2</sup> His subordinate assistants are the Sentries or Guards whom he has posted. "I consider a Sentry," wrote the Duke of Wellington,<sup>3</sup> "as a depository of the Public authority at his station, and that all men, however high their rank, are bound to obey" the orders he has to give them. Over those subject to the Military Code the Sentry acting within his orders has therefore supreme power; and in case of disobedience, he or rather the Officer of the Guard on the warning of the Sentry, has authority under the Articles of War to place the offender in arrest or confinement until released or tried by a Court-martial.<sup>4</sup>

7. The exception referred to arises in the case of frays or disorders amongst Officers or Soldiers, when authority is given by the Military Code to *all* Officers alike to order offending ones into prison or arrest. This power (which is accordant with the rule of the Common Law)<sup>5</sup> originated<sup>6</sup> in the 36th, 1672, was continued in the 20th of 1717, and is found as the 15th Article of War, in these words, "All Officers, of what

<sup>1</sup> Art. 34 of 1717, and Art. 14 of 1872. In the Navy the arrest is to be made under Warrant in writing with an offence specified, N. D. A. Sec. 50.

<sup>2</sup> Ed. 1798, p. 93.

<sup>3</sup> Despatch, Vol. iii. pp. 612, 613, and 1 G. A. O. 29th November 1809.

<sup>4</sup> See note GG on this subject, Vol. II. p. 174.

<sup>5</sup> See Mr. Baron Parke's Judgment in *Timothy v. Simpson*, 1 C. M. and R. 762.

<sup>6</sup> Art. 6 of sec. 10 of the Arts. of 1666 was somewhat similar in terms.

condition soever, have power to quell all quarrels<sup>1</sup> and disorders, though the persons concerned should be of superior rank or belong to another Corps, and either to order Officers into arrest or Soldiers into confinement, till their proper Superior Officers shall be acquainted therewith,"—the only noticeable instance is where an Inferior can give authority for the arrest of, or otherwise control, his Superior Officer.

8. There are, however, two cases in which offenders ultimately amenable to a Court-martial should not be arrested—except in the one case with the previous intervention of the Civil Power, and in the other by a Naval and not by a Military Officer. The first case is where a deserter is found in the character of a civilian. Hitherto the policy of the law has been to preserve the Civil *status* of the subject until changed under the attestation<sup>2</sup> or adjudication<sup>3</sup> of the Civil Magistrate. For the purpose of the latter alternative the Mutiny Act of 1717<sup>4</sup> gave directions to the Justices of the Peace to arrest suspected deserters, and transmit them to Civil custody, notifying the same to the Civil Minister, the Secretary at War. The same provision is found in the Mutiny Act,<sup>5</sup> and the direction given therein to take "the man before the Justice nearest to the place of his apprehension," was inserted for the purpose of protecting the citizen from mistaken identity, and the loss by such an error of his Common Law rights of citizenship.<sup>6</sup> The other case is where (as presently mentioned) the Officer and Soldier are on board a ship of war, commissioned by Her Majesty, under which circumstances all discipline and authority over all persons on board are vested in the Naval Officer commanding the ship.

9. It is clear that no privilege of Parliament will exempt the accused from Military arrest or subsequent trial by Court-martial. It is usual to communicate the fact of such an arrest to the Speaker of that House of which the Prisoner happens to be a Member, and the trial proceeds as in ordinary course.<sup>7</sup>

<sup>1</sup> That a Superior bringing an Inferior Officer to Court-martial for a private quarrel must come with clean hands before the Court, see G. O. of Duke of Wellington, 20th September 1813, p. 10.

<sup>2</sup> Vol. II. pp. 7, 33.

<sup>3</sup> *Ib.*, pp. 17, 47.

<sup>4</sup> Sec. 35.

<sup>5</sup> Sec. 34.

<sup>6</sup> *Wolton v. Gavin*, 16 Q. B. Rep. p. 75.

<sup>7</sup> Vol. I. p. 177.

Where a Member of the House of Commons was cashiered by a Court-martial, he was expelled the House on a record of the trial being brought up and read by the Clerk at the table.<sup>1</sup>

10. The arrest of an Officer is generally "open;" but it may be "close," at the discretion of the Superior Officer. The arrest of a Soldier is "confinement" and if necessary requires it, even in irons, according to the ruling alike of the Common Law Courts and the highest Military authority.<sup>2</sup> The distinction between "arrest" and "confinement" is found in all the Codes from 1717.<sup>3</sup> If the Officer violate the first, he is to be cashiered; or if the Soldier the other, his punishment—under the Code of 1717—was that of death as a Deserter; and under the present Code is according to the Act and the usage of the Service. The reason for the origin of such distinction in punishment was obvious. The Officer gave bail to the Crown in the value of his commission, but the Soldier—maybe a criminal or conscript—could too gladly have escaped from the Service, and certainly from Punishment at any time.

11. Military arrest or confinement is recognized as legal custody, with which the Civil Tribunal cannot interfere at the instance of a Creditor for a Civil debt.<sup>4</sup> If during its continuance the Prisoner should be charged with having committed or a large pecuniary obligation it may become the duty of the Superior Officer to render the Prisoner's person up to the Civil Magistrate—or his escape imperious. Where the arrest or confinement is at an end, care should be taken that the discharge from Military should not facilitate his escape from Civil process; and if he be an offender against the Criminal Law, he should, according to the direction of the Articles of War,<sup>5</sup> be handed over to the Civil power.

12. Both Codes make it obligatory upon the Officer commanding the Guard or the Prison-Master, to receive and keep till released by lawful Military authority any Prisoner com-

<sup>1</sup> *Castell's Hist. of the House of Commons*, vol. i. p. 100.

<sup>2</sup> Vol. I. p. 148. In the *Navy* the distinction is no greater, it may be more than the discipline of the Army requires, and the *Naval Discipline Act* Reg. p. 105.

<sup>3</sup> *Art. 11* of the *Code of 1717*, and *Art. 12* of the *Code of 1772*.

<sup>4</sup> *James v. Davidson*, 5 *Mason & Welles*, p. 226, and *3 Am. M. C. Rep.* 20.

<sup>5</sup> See *Kelghley v. Bell*, 5 *Exch. & F. Rep.* 76, and *13 M. & W.* 171.

<sup>6</sup> 1717, *Art. 44*; 1772, *Art. 12*.

mitted to his charge by a Superior Officer. The Articles of 1742 required the order for arrest to be in writing, and those of 1748 that the crime with which the Prisoner was charged should also be stated. So the Law stood till 1855,<sup>1</sup> when the Articles were altered by making it optional for the Committing Officer to state the charge at the same time, "or without unnecessary delay."<sup>2</sup> All, therefore, that the receiving Officer has to do is to satisfy himself that the Prisoner is one subject to the Military Code—for he would probably hold any one else at his peril.<sup>3</sup> Beyond this inquiry he has no responsibility, for—to use the words of a learned Judge—"the duty of receiving and keeping a prisoner arises *eo instanti* as soon as he is presented." Whether the crime be Civil or Military, his duty and obligation are the same.<sup>4</sup>

13. That no Prisoner might remain in custody without the knowledge of the General or Officer in Supreme Command, the Articles of 1672<sup>5</sup> provided that within twenty-four hours notice of the arrest and of the cause thereof should be given to him; and a similar provision is found in all the Codes from 1717. Thus, within twenty-four hours after the commitment, or as soon after as the Officer shall be relieved from his Guard or duty, he shall give in writing to the Officer Commanding, the Prisoner's name and crime, with the name and rank of the person who committed him, under the penalty of being cashiered for his neglect.<sup>6</sup>

14. The duration of imprisonment prior to the Prisoner's trial was by the Articles of 1717 limited "to five<sup>7</sup> days at farthest." In 1742, this period was extended to eight days, and so continued till the year 1865, when the Article provided "that no Officer or Soldier should continue in arrest more than eight days, or until such time as a Court-martial could be conveniently assembled,"<sup>8</sup> adding the penalty of cashiering upon any Officer

<sup>1</sup> Art. 20.

<sup>2</sup> How far the Officer would be bound by this statement is uncertain. *Hannaford v. Hunn*, 2 Car. and Pay. p. 155.

<sup>3</sup> In the American Courts see *Smith v. Shaw*, 12 John Rep. 260. *Ex parte Merryman*, Taney Rep. p. 246; *McColl v. McDowell*, 1 Abb. U.S. 212.

<sup>4</sup> *Wolton v. Gavin*, 16 Q. B. Rep. p. 70.

<sup>5</sup> Art. 72.

<sup>6</sup> 1717, Art. 44; 1872, Art. 72.

<sup>7</sup> Art. 40.

<sup>8</sup> Art. 19; Vol. I. p. 171.

"who when in command should immediately detain any prisoner in confinement without bringing him to trial."

15. Upon whom the responsibility of arrest and detention may ultimately fall depends on circumstances. The primary responsibility is with the Commanding Officer, who, in his report to the Superior Officer, will so far as he can, remove all doubt or difficulty may reasonably refer the case to those who are in supreme command over him and those again to the Responsible Ministers of the Crown. The time limit of responsibility is, as elsewhere shown, prescribed, and the detention of the Prisoner may be unlawfully postponed for not more than eight days, or as many weeks. Sir E. Hastings before the House of Commons<sup>1</sup> that it is often wholly impracticable to bring a Court without a long intervening delay—a fact which the conversant with the subject can attest. However, in the year 1863, serious misunderstanding, with subsequent litigation, arose; and in 1866 it was thought expedient to remove the limitation of eight days from the Military Code, the nature of War being altered to a direction that the trial should be held "within a reasonable time."<sup>2</sup>

16. Consequent upon arrest, follows a summary examination and committal for trial by a Justice in summary criminal procedure, a preliminary examination at the instance of the Commanding Officer, as to 1st. The Crime or Offence charged against the Prisoner; and 2ndly. The evidence upon which it is to be supported. If these be not sufficient to justify the Prisoner's trial he is ultimately discharged; though, if discharged, it by no means follows as a consequence in either Civil or Military procedure, that his arrest was illegal or wrongful, so that the authorities ordering it could be made liable for damages.<sup>3</sup>

<sup>1</sup> Art. 74. In the Navy the arrest is to be reported "as soon as possible" to the Admiralty or Commander-in-Chief. Ad. Rep. p. 195.

<sup>2</sup> *Warden v. Bailey*, 4 Man. and Sel. p. 419; *Kingsley v. Bell*, 4 Fes. and Fin. p. 800; *McCall v. McDowell*, *ante*.

<sup>3</sup> How far a tacit acquiescence would render the superior liable was discussed in *Smith v. Shaw*, 12 John R. p. 230. 73 H. D. (3), pp. 892, 1323.

<sup>4</sup> Vol. I. p. 172. See the Duke of Wellington's apology for delay to Captain R. Kelly (1812), Vol. xiv. Supp. Desp. p. 153. See sec. 6, Q. R. (1873).

<sup>5</sup> *Cave v. Mountain*, 1 Man. and Go. 257; *Kemp v. Neville*, 10 C. B. (N.S.), 519; *Basten v. Carew*, 3 Baw. and Cr. 649; *Sutton v. Johnstone*, *ante*.

17. This duty appears originally to have devolved on the Judge Advocate; for the Articles of 1662-3,<sup>1</sup> empowered him, "for the information and discovery of all Military offences," to take information or depositions on oath, on occasion should require, of all matters triable before Court-martial; and those of 1666,<sup>2</sup> provided that within forty-eight hours after arrest, he should be informed of the crime and arrest, that the Prisoner might be forthwith tried or discharged. The Articles of 1672<sup>3</sup> and 1717<sup>4</sup> threw the direct responsibility of the prosecution upon him, "in criminal matters which concerned the Crown" (as being by the Informer and Prosecutor before the Court), and in lesser matters, the practice was for the Judge Advocate to investigate the case, taking affidavits, if need be, from the Witnesses to be laid before the Court at its future meeting.<sup>5</sup> The "Marshal's" Court was, therefore, never that of the Judge Advocate, but of the Military Chief or Hierarch, against whose rules of discipline the Officer or Soldier (as the case might be) had offended. Before that Tribunal the Judge Advocate had to appear as the Informer and Prosecutor until 1717, and as the Prosecutor until 1829, to ensure what is now attained by the Judge Advocate-General's advice, viz., that "No accusation should be preferred which cannot be maintained" before the Court-martial.

18. The Commanding Officer of the Prisoner has the immediate control of the arrest, and not the Court-martial before whom he may be ultimately arraigned. While the Prisoner is before them, the members of the Court must see that he has such freedom as will facilitate his defence; but the Court, while he leaves that tribunal, cannot order the detaining Officer to give him full or partial freedom either to see or to examine his Witnesses, but this discretion rests solely with the detaining Officer.<sup>7</sup>

19. But the power of duress or confinement, which ever

<sup>1</sup> Art. 23.

<sup>2</sup> Sec. 13, Art. 7.

<sup>3</sup> Art. 64.

<sup>4</sup> Art. 22.

<sup>5</sup> Mr. W. Blathwayte's Instructions to Mr. Clarke, 19th Feb. 1694-5, C. Bk. (114), p. 127.

<sup>6</sup> Sec. 735 Queen's Reg., 1868, and sec. 16, art. 8, of 1828, and par. 13, *post*.

<sup>7</sup> Benét, p. 72; Simmons, p. 120, and Lord Brougham, 15 H. D. (3) 944.

Commanding Officer must occasionally exercise over his men for purposes of discipline, must not be confounded (as unfortunately in recent years it has been) with Military arrest strictly so called under the Articles of War. "Some," said Lord Holt, speaking of Civil authorities, "have power to imprison by law, who do not do it by way of punishment, but by way of prevention; as a Constable may commit one to prevent a fray."<sup>1</sup> The same rule and principle are obviously more needful in Military than in Civil strife, to govern martial men than unarmed citizens, and therefore, to prevent the commission of crime, "I have kept whole divisions of the Army under arms for days."<sup>2</sup> No crime could then be committed. In the same manner I can have half-hourly or hourly roll-calls<sup>3</sup> or parades. I can confine men to barrack yards; I can send them out to walk in a town in squads, in charge of a Non-commissioned Officer."<sup>4</sup> So wrote the Duke of Wellington in the year 1829, and was unrebuked: but in 1863, when a General Officer (who was neither a Military tyrant nor a novice in the art of War) placed three Non-commissioned Officers under arrest to withdraw them from crime and to save a Regiment on the Indian Establishment from mutiny, he was rebuked by a Judge Advocate General forgetful of Lord Holt's ruling, and told that the Military Law did not authorize detention or arrest of any one to save him or his Regiment from the catastrophe of crime.

20. The rule of the Military Service may be accepted as laid down in these words by a General of experience:—"The *Custom of War*"<sup>5</sup> most undoubtedly throws on Commanding Officers of whatever rank, the duty of preventing mutiny, or any crime

<sup>1</sup> *Grenville v. Coll. of Physicians*, 12 Mod. Rep. p. 388; 2 Hale, P. C. 89-94; *Handcock v. Baker*, 2 Bos. and Pull. p. 262; 2 & 3 Vic. c. 47, s. 64; *Light's Case*, D. and Bell. Rep. 338.

<sup>2</sup> See Orders of Aug. and Sept. 1809, as to Bechives (p. 111-16), and an instance in 1813 at Vittoria, Vol. xiv. Supp. Desp. 246. "That the Battalion be kept standing under arms every day from daylight until dark, all Officers being present, till the perpetrators of the disgraceful robberies be discovered." G. O. 18 Aug. 1815, *ib.* p. 582.

<sup>3</sup> See, on entering France in 1813, *ib.* p. 314, and in 1815, p. 575; in India (1803), G. A. O. 7th Nov.

<sup>4</sup> Duke of Wellington's Memorandum, Vol. viii. Gur. Desp. p. 346.

<sup>5</sup> War Office Records of the Crawley Case, p. 319.



or action which might be held to tend to such a result. In like manner, it throws on Commanding Officers the duty of arresting crimes of violence, or what may tend to them. Thus, when an Army is in the field, it is not an uncommon occurrence to confine all the troops for several days together to their camps, to prevent pillaging or cruelty to the inhabitants of the seat of war. On such occasions, the whole Army is, as it were, under arrest for the prevention of crime, and any Officer or Soldier breaking that general arrest of the Army is liable to the severest punishment, including that of death, for disobedience of orders,—a punishment, under certain circumstances, not unlikely to ensue. It was the practice of the Duke of Wellington to add a physical fatigue in addition to the mere confinement to camp; for we read, in his Orders given during the Peninsular War, that whole divisions were at times kept for long periods under arms, when it was deemed an imperative necessity to stop plunderings. It will be further admitted that, in Military usage or in the custom of war, is included the redemption of Military responsibility; and, consequently, that any Commanding Officer failing to redeem his responsibility for the prevention of crime, is liable to be removed from his command, and to be otherwise dealt with according to law, because he has not vindicated the custom of war, or in other words, Military usage, for the maintenance of discipline.”

21. No doubt in this, as in every other act of Military authority, the Officer, if shown to have acted oppressively, would be brought to Court-martial and punished; but the legal power of the Commanding Officer to confine them to barracks for purposes of discipline cannot be questioned.<sup>1</sup>

22. The legal remedy which is open to any one placed under Military arrest which he deems to be unlawful, is an application to the Queen's Bench for a writ of Habeas Corpus that he may be brought up before that Court and forthwith discharged. The case of Wolfe Tone,<sup>2</sup> in 1798, is possibly better known than any other, from the circumstances of the time, and from the fact that he had been ordered for execution before the writ was applied for. Other cases have, however, arisen, as Blake's,<sup>3</sup>

See Col. Orde's Case, 1813, 26 H. D. (O. S.), p. 1150.

<sup>1</sup> Vol. II. p. 169.

<sup>2</sup> Vol. I. p. 172.

in 1814, where the Court remitted the prisoner to Military custody, and Douglas's case, in 1842,<sup>1</sup> where the prisoner was discharged. It is admitted that the Jurisdiction of the Queen's Bench extends over persons held in Military custody, and that it will be exercised with the view of determining, *according to the rules of Military Law*, whether the custody is or is not lawful; if the latter, damages may of course be recovered.<sup>2</sup>

23. But against oppression the Prisoner has a legal remedy. In Captain Wall's case, where he was kept in prison for nine months at Gambia before a Court-martial was summoned, he recovered 1000*l.* damages against the Committing Officer, whose conduct Lord Mansfield stigmatized as "malignant." In words that cannot be too often repeated, he said: "The principal inquiry to be made by a Court of Justice in such cases is how the heart stood. If there be nothing wrong there, great latitude will be allowed for misapprehension or mistake."<sup>3</sup> In another case, where a Soldier was imprisoned by an Officer for disobedience to orders made under the colour, but not within the scope of his Military authority, a remedy at Law was said to exist, though the prosecution of it was deprecated by the Court.<sup>4</sup>

24. The Common Law Courts would not, therefore, give damages for the fair and honest exercise of Military authority, though exercised on mistaken facts or inferences, and greatly to the Prisoner's injury. Nor would they interfere by ordering the Prisoner's release under Habeas Corpus,<sup>5</sup> because the Prisoner's confinement exceeded eight days.<sup>6</sup> Such attempts have been made in former times, and repeated in recent years; but, meeting with no encouragement whatever from the Judges of the Superior Courts at Westminster,<sup>7</sup> they have signally failed.

<sup>1</sup> 3 Q. B. Rep. p. 830.

<sup>2</sup> Vol. ii. Ad. Op. p. 31.

<sup>3</sup> Vol. II. p. 155.

<sup>4</sup> *Warden v. Bailey*, 4 Taunt. Rep. p. 89.

<sup>5</sup> *Re Blake*, 2 Mau. and Sel. p. 424.

<sup>6</sup> *Warden v. Bailey*, 2 Mau. and Sel. p. 406.

<sup>7</sup> *Dawkins v. Rokeby*, 4 Fos. and Fin. p. 806.

## CHAPTER IX.

## THE ARRAIGNMENT, TRIAL, AND SENTENCE OF THE PRISONER.

1. WHEN provision was made, under the Military Code, for the trial of an offender by a Court composed of a President and twelve Officers, it may reasonably be presumed that the controlling analogy which suggested this tribunal, was the Civil Administration of Justice by a presiding Judge appointed by the Crown, and twelve Jurymen<sup>1</sup> summoned by the Sheriff to deal with all the questions of Law and Fact that might be brought before them: in truth, that those Statesmen and Warriors who originally framed the Military Code desired, as most Englishmen would do, to secure the administration of Justice to their fellow countrymen, and therefore, that they established the "Military" with as much similarity to the "Civil" Tribunals of the country, as the circumstances under which these different Jurisdictions were to be exercised would admit of.

2. In following throughout the subject of the present Chapter, it will be seen that the same rough analogy has been preserved, and that the "Military" has been gravitating towards the "Civil" Administration of Justice. In the various changes that during the last two centuries have been made in the rules of procedure, the main desire—that of securing to the Prisoner a fair trial—is conspicuous. Though Military, like other tribunals, may be fallible, the spirit of Justice leavens their proceedings; and "these Courts," to quote the words of the Court-martial

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<sup>1</sup> Turner writes of the "President" with "12 or 14 assessors" as forming a Court-martial, p. 206. To attempt to make the Judge Advocate (who is only the Recorder) rather than the President—who is a Judge—supreme is a mistake, not a reform. Rival or dual authority is thus created, whereas the unity of the Court and the authority of the Judges should have been upheld. Rep. of C. M. Com. 1869, App. II. and p. 102.

Commissioners, "have the confidence of the Army,"<sup>1</sup> and are satisfactorily spoken of, even by those who have been subjected to their jurisdiction."

3. The method in which Justice is to be administered, will be seen by reference to the "Regulations and Forms of Procedure" printed in the Appendix. What is there given will not be anticipated here; but it will be assumed, that as each Officer is required to make—so each reader will have made—"himself well acquainted with the Mutiny Act, Articles of War, and Queen's Regulations, so far as a knowledge of these is necessary for the performance of the duties of members of Courts-martial."<sup>2</sup> As supplementary to the information there given, this text is written.

4. In ordinary cases, the Offences of Soldiers are now disposed of—at the instance of the Commanding Officer, and without the intervention of the Judge Advocate—by the Regimental Court. Under the Code of 1717, the primary Jurisdiction, except in Capital cases, appears to have been in this Court; for, in addition to the powers (which might be the subject of appeal to a General Court), of punishing the Soldier under the Mutiny Act "for immoralities, misbehaviour, or neglect of duty,"<sup>3</sup> the Articles declared specifically,<sup>4</sup> "That all controversies in the Regiment between the Soldiers and their Officers, relating to their Military capacities," should be there determined; and that, on notice of the arrest, the Colonel<sup>5</sup> should summon this Court for the punishment of the Prisoner. If the Regimental Court should adjudge the Case to be beyond its Jurisdiction, the Colonel was then to send to the Secretary at War the "Proceedings, proofs, and examinations made therein," for an order to summon a General Court.

5. Where the nature of the offence, and the limit of the Jurisdiction are matters of doubt, the Commanding Officer, at the present time, forwards a report of the facts to the General of the District; and it is left to his discretion to determine whether by any, and which, Military Tribunal the prisoner shall be tried—his ruling being final. A discretion would appear to

<sup>1</sup> 2nd Rep., p. 3.

<sup>2</sup> W. O. Circular, Army and Reserve Forces, 1872.

<sup>3</sup> First inserted in the Mutiny Act, 12 Anne, c. 13, sec. 3, and continued till the year 1851. Vol. I. pp. 153, 154.

<sup>4</sup> Art. 21.

<sup>5</sup> Art. 40.

have always been held by the General in cases where, by the Military Code, the Jurisdiction of the Regimental on the one hand, or a General Court on the other, was not defined; for though a certain original Jurisdiction was given to a General Court by the Code of 1717, in cases (a) Of Crime punishable with Death,<sup>1</sup> and (b) Of an Officer having a complaint to make against his Superior,<sup>2</sup> or (c) Having himself committed an offence—yet a discretion as to the selection of either Court was left to the General: in other cases, as (d) Of words used<sup>3</sup> in contempt of the General, or (e) Of waste<sup>4</sup> committed in Quarters or March; for the Prisoner was to be “punished according to the nature and degree of the offence, by the Judgment of a Regimental or General Court-martial.”

6. In former times—that is from 1758 to 1828—a discretion as to the tribunal or authority by which the offender should be punished, appears to have been intrusted to the Committing Officer; for the Articles<sup>5</sup> of War directed him to give notice of the arrest to the Colonel, if the offence (of which he was to be the judge) were a neglect of duty in his own corps—or to the Commander-in-Chief in other cases. However, to secure greater uniformity in the administration of justice, the Articles of 1829<sup>6</sup> provided, as the Code<sup>7</sup> now remains, that no Commanding Officer shall give in vague or indefinite charges against a Prisoner, so that the trial may be before a Regimental instead of a higher tribunal; but that, in cases of doubt, each one shall (with the proposed charges) be laid before the General, for his decision thereon.

7. Assuming that the offence be one for trial by a Superior Court, the charges and evidence are sent up by the Colonel to the General of the district, for his directions to be given—whether a district or a General Court shall be summoned. Where dealt with by the District Court, the charges are (either with or without the aid and advice of the Judge Advocate General) framed, approved, and submitted to that Court, the President there acting as Judge Advocate. Where a General

<sup>1</sup> Art. 21.<sup>2</sup> Art. 19.<sup>3</sup> Art. 6.<sup>4</sup> Art. 30.<sup>5</sup> Compare 1742, Sec. 15, Art. 22; and 1828, Sec. 16, Art. 28.<sup>6</sup> 91st.<sup>7</sup> 140th.

Court is to dispose of the case, the charges are then framed, approved, and submitted to the Judge Advocate General; and the Court—though summoned by the General—is aided by a Judge Advocate acting under deputation from his Legal Chief.

8. The policy of the Mutiny Act has been to provide that the Court shall be legally constituted by having a Statutory quorum, 1st, under ordinary,<sup>1</sup> and, 2ndly, under extraordinary circumstances; leaving with the Convening Authority the discretion to summon a larger number of Officers to serve with the quorum, and to determine whether the Court shall be constituted under one quorum or the other.<sup>2</sup> In either of these circumstances, the discretion of the Convening Authority may be considered as absolute. In the American Code thirteen are to be summoned, where that can be done “without manifest injury to the Service,” and Mr. Justice Story held (in “*Martin v. Mott*”<sup>3</sup>) that this was a direction only to the Convening Officer, and as a matter submitted to his sound discretion—that his decision in summoning a less number must be considered as conclusive.

9. The number of the Judges is therefore, within certain Statutory limits,<sup>4</sup> at the discretion of the Crown and of the Convening Officer; in which respect the constitution of a Military varies from that of the Common Law Court, where twelve men (neither more nor less) form the Jury by whom the issue is to be tried.<sup>5</sup> If in the course of the Civil trial a sworn Jurymen retires or dies, the trial is at an end; but if Officers, then supernumerary, withdraw from necessity and by leave of the President, the fact and the cause of it are stated on the Record of the proceedings, and the trial proceeds: for so long as the legal quorum exists a Court-martial is legally constituted.<sup>6</sup>

10. The various crimes and punishments which each of these

<sup>1</sup> Vol. xiv. Supp. Desp. p. 124. 1863-72. 308. 15 H. D. 3, 422.

<sup>2</sup> See Mutiny Act, sec. 10, 12; Art. of War, 15, 112.

<sup>3</sup> As to Naval Courts, see N. D. A. sec. 5.

<sup>4</sup> Vol. xii. Wheat. Rep. pp. 34-35; Vol. i. Art. Reg. General, 1802, 1802, p. 534, and Vol. vi. 31, 1854; Criminal, pp. 386, 389.

<sup>5</sup> Mutiny Act, sec. 3, 9, 10, 12; N. D. Act, sec. 12 and 30.

<sup>6</sup> *Muirhead v. Evans*, 6 Exch. Rep. p. 447.

<sup>7</sup> Vol. i. M. Ar. pp. 234, 235, 413-421.

Courts can try and award, are to be found in the Mutiny Act and Articles of War.<sup>1</sup> As in their method of procedure these Courts have rules of a common origin, and as those who as members take part in the administration of Justice have authorities and duties so similar in each Court, they may be treated of together. As the highest in authority, the General Court will be that under consideration, with a notice of such differences in practice, if any, as occur in the District and Regimental Courts.

11. Of every Court the Judicial power is in all the Officers equally; though the President, as the principal member, is usually appointed by the Convening Officer, and is responsible to him for the order and regularity of its procedure. "He is charged," wrote the late Sir Charles Napier, "with all the duties and details of conducting the trial—he makes the members take their seats according to their rank—clears and re-opens the Court when necessary—preserves order—collects the votes; no questions are put but through him, or by his permission, and that of the Court."<sup>2</sup> Should the President, in the course of the trial, happen to die or be obliged to withdraw, the next Senior Officer is sworn in as President, and—assuming, of course, that the Statutory quorum remains<sup>3</sup>—the trial proceeds as theretofore. These separate responsibilities were first assigned to him in 1829, by Articles<sup>4</sup> which remain in the present Code.<sup>5</sup> He is to seat the members according to their rank; and, having done so, no member can withdraw, except with his permission. If intemperate words be used by any member, they are to be taken down and reported by the President to the Convening Authority. And, finally, he is held responsible that no reproachful words be used to Witnesses or Prisoners; and that every person attending the Court is treated with proper respect.

12. The President should therefore hold a strictly impartial bearing towards the Convening Authority, on the one hand, and the Prisoner on the other. So far back as 1737, the Crown

<sup>1</sup> As to Navy, see Chap. III. par. 5.

<sup>2</sup> Sir Charles Napier, G. O. of 16th May, 1850. As to Naval Courts, see N. D. A. sec. 58, and Ad. Reg. p. 98.

<sup>3</sup> L. O. Adm. 17 Oct. 1798, and *ib.* Vol. ii. Ad. Rec. p. 458.

<sup>4</sup> Art. 91.

<sup>5</sup> Art. 162.

was advised by Sir D. Ryder (as Attorney-General) not to permit the President to confirm the proceedings of the Court, for "The Articles of War<sup>1</sup> suppose," as he wrote, "the Sentence to go through another examination," "which would not be the case if the President is to confirm his own Judgment. I do not find there has ever been any instance of the like power granted to a President, and it seems to me not advisable." By the Articles of 1847,<sup>2</sup> as amended in 1854,<sup>3</sup> and as they now stand,<sup>4</sup> it was provided that the President shall in no case be the Confirming Officer, or the Officer whose duty it has been to investigate the charges on which the Prisoner is to be arraigned. Even the proceedings of a Detachment *General Court*, which the President may convene,<sup>5</sup> must be confirmed by higher authority—the General Officer in Command of the Army.<sup>6</sup>

13. In the United Kingdom a Deputy or Acting Judge Advocate attends each General Court-martial on the deputation of the Judge Advocate General, but elsewhere on the appointment of the General;<sup>7</sup> and he is sworn not to discharge any specific duty, but only to secrecy.<sup>8</sup> District and Regimental Courts have no such Officer. In 1860<sup>9</sup> it was expressly provided that the Judge Advocate should no longer be the Prosecutor, nor can he be a Witness for the prosecution in the Court upon which he is attendant.<sup>10</sup> The Articles of 1639<sup>11</sup> imposed upon him the duty of recording the Proceedings, and he now holds the same responsible office. "He cannot interfere with anything of his own authority in the privileges of a Court-martial—for which the president and members are alone responsible."<sup>12</sup> He has *no judicial* power nor any determinative voice either in the sentences or interlocutory opinions of the Court; he is not, therefore, entitled to regulate or dictate those sentences or

<sup>1</sup> Vol. I. p. 515.<sup>2</sup> Art. 115.<sup>3</sup> *Ib.*<sup>4</sup> 1872, Art. 114.<sup>5</sup> 1872, Art. 114.<sup>6</sup> Sec. 12 of Mutiny Act, 1872.<sup>7</sup> In Naval Courts see N. D. A. sec. 61, and Ad. Reg. p. 99.

<sup>8</sup> In America the Judge Advocate is a statutory officer, and therefore it was thought that not appearing on the Record to have been sworn, the proceedings were irregular and void. 1838, Grundy, Vol. iii. Attorney-General's Opinions, pp. 396-397; Brooks v. Graham, 11 Pick. Rep. 443; but see Chap. V. par. 4, *ante*.

<sup>9</sup> Art. 163.<sup>10</sup> Art. 159 of 1872. For the Prisoner he may be. Adye, p. 195.<sup>11</sup> Vol. I. p. 438, and Art. 61 of 1672. <sup>12</sup> Sir C. Napier, Vol. ii. p. 364, *noté*.



opinions.”<sup>1</sup> He should be (in Lord Brougham’s<sup>2</sup> definition) “the assessor of the Court—standing between the Prisoner and the Court;” or (as Lord Cranworth<sup>3</sup> defined his office) “the *Judex Advocatus*,”—a Judge called to assist the Court—though forming (I apprehend) no constituent part of it. No challenge can be made to the Judge Advocate,<sup>4</sup> and he may withdraw and resume his duties,<sup>5</sup> or, if necessity obliges it, the official acting as such may be changed in the course of the trial without disturbing the order of the Court’s procedure.<sup>6</sup>

14. The office of Prosecutor, since the Judge Advocate has been deposed from it, has not been assigned to any other official.<sup>7</sup> In some cases the Adjutant acts in that capacity, and in earlier times it would appear that the Major discharged that duty. Adye suggested, in 1794, that the Adjutant should never sit as a member of the Court; because, if it became his duty ultimately to put the Sentence into execution, the policy of the Law would be infringed and his responsibility increased by having the office of Judge and Executioner discharged by the same person.<sup>8</sup> If the Sentence should prove illegal, he would lose his legal immunity as Sheriff, by having awarded the Sentence as Judge. However, whoever the Prosecutor may be, he can also be a Witness,<sup>9</sup> though, if for the Crown, he should then give his evidence before any other person. The union of duties as Advocate and Witness finds no favour in the Common Law Courts.<sup>10</sup>

15. The Members, as well as the President, act under the authority of the General or other Convening Officer, and in subordination to the President as their Superior Officer. When attendant and sworn as members, the Court is formed, and the Prisoner may be tried. But, as in Criminal Procedure for life

<sup>1</sup> Tytler, s. 354.    <sup>2</sup> Vol. II. p. 363.    <sup>3</sup> In 1864. 173 H. D. (3), p. 1174.

<sup>4</sup> Benét, p. 81; Simmons, p. 176; 19 H. D. (3) 600.    <sup>5</sup> Benét, p. 98.

<sup>6</sup> Simmons, p. 208. In Armstrong’s case, this occurred to a Court re-assembled for revision of the sentence, 9th Aug. 1842.

<sup>7</sup> In Naval Courts he may act as such, Ad. Reg. p. 99.

<sup>8</sup> Pp. 93, 94. The N. D. A. [sec. 58 (8)] prohibits the Prosecutor from sitting on the Court.

<sup>9</sup> In America that the prosecutor may give evidence, see (1841 Legare) Vol. iii. A. G., p. 714.    <sup>10</sup> Cobbett v. Hudson, 1 Ell. and Bl. p. 12; 17 Jur. p. 488.

or limb, the Common Law allows of Challenge against the Jury,<sup>1</sup> so by Custom<sup>2</sup> first and by the Code since 1847, this right—which, strictly speaking,<sup>3</sup> should be exercised before the Members are sworn—has been secured to the Military Prisoner. Challenge by the Crown appears always to have been allowed—the cause being assigned and its relevancy or validity being decided by the Court.<sup>4</sup> In the Mutiny Act of 1847<sup>5</sup> the right was secured to the Prisoner (without mention of the Prosecutor), subject to the conditions which are now to be found in the 152nd Article of War.<sup>6</sup>

16. The object of all interested in the administration of Justice is to obtain a competent<sup>7</sup> and impartial tribunal—one actuated neither by “partiality, favour, or affection.” Keeping these objects in view, the Judges must all be Officers of competent rank,<sup>8</sup> with no professional or pecuniary<sup>9</sup> interest in the result of the case. Advancement by the Prisoner’s dismissal from the Service, or taking part for or against him in any previous inquiry<sup>10</sup> into this or any other proximate matter, would be good cause of Challenge. If the Officer be a Witness for or against the Prisoner, he ought not, if possible, to act as a member of the Court; but, should he do so, he is not thereby

<sup>1</sup> *Barrett v. Long*, 3 H. of L. C. p. 409.

<sup>2</sup> *Tytler* (1814), pp. 221–225; *Adye*, p. 168.

<sup>3</sup> This is not always insisted on. *Tytler*, p. 232.

<sup>4</sup> At Common Law the prisoner cannot question the Jury, so as to prove his objections or otherwise by the Juryman’s evidence. The Judge would refuse to allow the questions to be answered. *King v. Edmonds*, *post*. <sup>5</sup> Sec. 14.

<sup>6</sup> As to Challenge in Naval Courts, see sec. 62 N. D. Act and Ad. Reg. p. 99, and *ib.* (1868) p. 40.

<sup>7</sup> An Officer who had lost his ship was held (before his trial) incompetent to sit on a Naval C. M., Vol. ii. Ad. Op. 37.

<sup>8</sup> Lord Eldon advised that challenge could be made on the ground of infancy, because a Juryman must be twenty-one (and under sixty years. 6 Geo. IV. c. 50, sec. 1). See Vol. i. Ad. Op. p. 515. The N. D. Act, s. 58, requires every officer to be twenty-one. In 1805 the House of Commons refused to require the President to be twenty-one years of age. 3 H. D. (O. S.) 860.

<sup>9</sup> *Bailey v. Macaulay*, 13 Q. B. Rep. p. 829.

<sup>10</sup> Vol. i. M’Ar., p. 275; *Queen v. Sullivan*, 8 Adol. and Ell. pp. 831, 832. It is thought by some that if the Court of Enquiry has recorded evidence only but no opinion, officers serving thereon are not disqualified as members of a Court-martial. 19 H. D. (3) 601. At Common Law no one should be first on the Grand and then on the Special Jury; in fact, “an indictor ought not to be a trier.” *King v. Edmonds*, 4 B. & Ald. 492, and Vol. ii. Ad. Op. p. 379.

precluded from giving his testimony publicly to the Court<sup>1</sup> as a Witness, sworn, examined, and cross-examined, rather than to his compeers privately. As the Crown nominates the Members (so completely that in 1866 officers and a barrister as Judge Advocate were selected in England and sent to Jamaica to form a Court for the trial of Officers there), and these determine the Challenges, the Prisoner might, by their joint action, be deprived of essential testimony,<sup>2</sup> unless the Members of the Court could be called to testify on his behalf. The Challenge, with the Decision, should appear on the Record<sup>3</sup> of the Proceedings; and if other Officers are easily attainable, it may be well to allow any feasible objection rather than that the proceedings should be annulled by the Convening Authority, or that the Prisoner should raise any fair claim to be considered a martyr to a supposed injustice.<sup>4</sup> If no Challenge be made, the Prisoner would,<sup>5</sup> I apprehend, be bound by the Finding and Sentence of the Court, though some of the Members, if challenged, would have been removed from the panel.

17. The Challenge having been disposed of, the Judges are sworn—in a General Court<sup>6</sup> by the Deputy Judge Advocate, and in the other Courts by the President—according to the peculiar ceremonies of their own Religion or *in such manner as they deem binding* on their consciences.<sup>7</sup> These oaths, like many others, define the duty which those who take them have to discharge.<sup>8</sup> In substance they have remained the same for the last 200 years, and contain the measure and method of Justice to be administered by them in the Court-martial.

18. "In the Military, as in the Civil, system of Judicature," said Mr. Villiers,<sup>9</sup> as Judge Advocate General, in 1855, "there is a written and an unwritten Law—the one based on the Mutiny

<sup>1</sup> Burns's Justice, title "Jury," and Vol. ii. Tay. Evid. p. 1196, 1197.

<sup>2</sup> Vol. i. M'Ar., p. 274; Vol. ii. pp. 82-86; Adye, pp. 124-128, 196.

<sup>3</sup> Carmarthen v. Evan, 10 Mee. and Wel. p. 274. <sup>4</sup> Sir Charles Napier.

<sup>5</sup> King v. Sutton, 8 B. and Cr. s. p. 419; and Pryme v. Titchmarsh, 10 Mee. and Wel. p. 605. <sup>6</sup> In Naval Courts see secs. 63 & 64 N. D. A.

<sup>7</sup> 2 Tay. Evid. p. 1202; Robey v. Langston, 3 Keb. p. 314. On the Holy Evangelists (or a Prayer-book containing the Gospels) if a Christian, or on the Pentateuch if a Jew.

<sup>8</sup> See Lord Somers' observations on the oath of the Judges in the Exchequer in the Banker's Case, 14 Stat. Tri. p. 63. <sup>9</sup> 137 H. D. (3), p. 1136.

Act and Articles of War, the other upon Custom and Established Usage, recognized and applied in numberless cases. Both these branches of Military Law are recognized by the Legislature," for every member of a Court-martial is required by the Mutiny Act to take the oath there prescribed upon the separate trial of any prisoners.<sup>1</sup>

19. Upon referring to the Code of 1672,<sup>2</sup> it will be seen that Justice was to be administered under the sanction of an oath: the members of the Court being sworn to administer Justice "according to these Articles, or (when these assign no absolute punishment) according to their consciences, the best of their understandings, and the Custom of War in the like cases. In Anne's Reign the Judges were sworn against Bribery, "not to receive any gratuity or present, either directly or indirectly,"<sup>3</sup> and (as in 1717)<sup>4</sup> to try the case "without partiality, favour, or affection;" and, upon doubt arising, which was not explained by the Mutiny Act and Articles of War, then according to conscience, as before directed.<sup>5</sup>

20. "This oath,"<sup>6</sup> said a learned Judge,<sup>7</sup> in a recent case, "is abundant to show, with respect to all matters which come under the cognizance of the Military Tribunals, they are subject to a test of Law which is different from that administered in a Civil Court, and it is to be according to Military usages and their approval; whereas here [in the Court of Common Pleas] we have a test according to Law and the custom of England—that is to say, the Law and custom which regulate ordinary transactions out of the Army."

21. "A Military Court," wrote the late Sir Charles Napier, "should be a Court of Honour; it is a bad system which turns the members that compose it into Attorneys at Law: they lose the frank, Soldier-like sense of their duty as members of a

<sup>1</sup> Coffin v. Wilbur, 7 Pick. Rep. p. 150.

<sup>2</sup> Art. 60.

<sup>3</sup> Bruce, p. 308.

<sup>4</sup> Art. 22.

<sup>5</sup> Art. 152. These oaths were extended to Regimental Courts in 1805.

<sup>6</sup> In the Navy "usage" was and is the essence of the judicial system, and when Parliament prescribed an oath for the Judges it adopted that which was in use in both services (see 22 Geo. II. c. 33, sec. 16). In 1860 the usage was ignored, and the oath was limited "to Justice according to Law." (See 23 & 24 Vic. c. 123, sec. 54.) Chap. III. par. 2, note 2. Was this done advisedly?

<sup>7</sup> Justice Willes, in Dawkins v. Lord Rokeby, 4 Fes. and Fin. p. 833.

Court-martial with one grand conscientious duty to perform—that of acquitting the Prisoner against all legal rules of evidence if they believe in their hearts he is innocent; and condemning him, if they conscientiously believe him to be guilty. In short the business of a Court-martial is not to discuss points of Law but to get at the truth by all means in their power.”<sup>1</sup> Certainly, if conclusive arguments be needed, they are to be found in these extracts for the Constitutional Dogma, that Military Offences, and those *only*, should be submitted to the arbitrament of Courts-martial.<sup>2</sup>

22. The Oath of Secrecy arises out of the necessities of the case. In early practice, the War Office Books<sup>3</sup> show that the finding of each Member came up before the Crown or General; and therefore, for the security of the Judges, the Oath of Secrecy was imposed as early as Queen Anne’s Reign, and has continued to the present day. Even in the Civil Administration of Justice, Secrecy is not a principle wholly unknown to the Common Law. Grand Jurors<sup>4</sup> are forbidden by their oath,<sup>5</sup> on the grounds of Public Policy, from disclosing evidence and other matters coming judicially before them. So, also, Officers of the Revenue Departments are forbidden by Statute,<sup>6</sup> and by their oaths, from disclosing even matters of fact otherwise needful for the Courts of Justice to be informed of.

23. After full explanation and debate as to its necessity, the oath<sup>7</sup> was first sanctioned by Parliament in the Mutiny Act of 1748,<sup>8</sup> with this limitation, unless disclosure was “required by Act of Parliament,” which, in the following year,<sup>9</sup> was altered thus:—unless “required to give evidence as a Witness by a Court of Justice in a due course of Law.”<sup>10</sup> It is now extended to Officers who are present for educational purposes.

Constituted as a Court-martial is, and employed in the discharge of a duty often so invidious as to decide between

<sup>1</sup> On Military Punishments, p. 36; and see his Life at Vol. ii. p. 121, Vol. iii. pp. 108–136, Vol. iv. pp. 37 and 211. <sup>2</sup> Vol. I. p. 158.

<sup>3</sup> See Entry of Court-martial, 8 May 1693, in Mis. Bk. 517, p. 70.

<sup>4</sup> Reg. v. Cooke, 8 Cav. and Pay. p. 584. <sup>5</sup> Burns’s Justice, title “Jury.”

<sup>6</sup> Lee v. Birrell, 3 Camp. Rep. p. 337. Taylor on Evidence, vol. ii. p. 840.

<sup>7</sup> Vol. I. p. 168. <sup>8</sup> 22 Geo. II. c. 5. <sup>9</sup> 23 Geo. II. c. 4, sec. 5.

<sup>10</sup> As to disclosures to Parliament, 3 Hat.’s Prec. p. 35, note.

Brother Officers or between a private Soldier and an offended General, it would be hopeless to expect impartial Justice unless the Ballot or secret voting was in such a case continued.

24. Before the Prisoner's trial proceeds, the President should satisfy himself, 1st, that the Court is legally constituted, (*a*) in the authority convening it, (*b*) in the number and qualification of its members; and, 2ndly, that the prisoner is amenable to the Jurisdiction in regard to his (*c*) status and (*d*) alleged offence, ever remembering that he and the other members of the Court would be civilly or criminally responsible for all acts which would become wrongs if done without legal authority or jurisdiction.<sup>1</sup> "A Court-martial is a Court of limited and special Jurisdiction," said a learned Judge of the American bench; "it is called into existence for a special purpose, and to perform a particular duty; and when the object of its creation is accomplished it ceases to exist. The Law will intend nothing in its favour, and he who seeks to enforce its sentence or to justify its Judgments must set forth affirmatively and clearly all facts necessary to show that it was legally constituted, and had Jurisdiction."<sup>2</sup>

25. (*a*.) "If he that gives judgment of death against a person," wrote Lord Hale,<sup>3</sup> "hath no Commission at all,—if sentence of death be commanded to be executed by such person, and it is executed accordingly, it is murder in him that commands it to be executed, for it was 'coram non judice.'" The Commission to hold Courts-martial must, therefore, follow strictly upon the language of the Mutiny Act—the authority under which their jurisdiction as Statutory Courts is to be exercised.

26. (*b*.) "It seems agreed," wrote Hawkins,<sup>4</sup> "that any judgment whatsoever given by persons who had no good Commission to proceed against the person condemned, may be falsified by showing the special matter without writ of error because it is *void*: as where a Commission authorizes to proceed on an

<sup>1</sup> Vol. i. M<sup>c</sup>Ar., pp. 269, 436; Vol. I. Chap. viii. par. 92, and cases cited.

<sup>2</sup> Brooks v. Graham, 11 Pick. Rep. 443.

<sup>3</sup> 2 Pl. of Cr., Chap. xlii. p. 497, and Justice Heath, in Warden v. Bailey,

<sup>4</sup> Taunt. Rep. p. 77; Lord Holt, in Grenville v. College of Physicians, 12 Mod. Rep. p. 388.

<sup>5</sup> Vol. iv. p. 383 (ed. 1769).

indictment taken before A., B., C., and twelve others, and by colour thereof the Commissioners proceed on the indictment taken before eight persons<sup>1</sup> only:" and Blackstone,<sup>2</sup> citing this authority, proceeds thus:—"Where a Commission issues to A. or B. and twelve others, or any two of them, of which A. or B. shall be one, to take and try indictments, and any of the other twelve proceed without the interposition or presence of either A. or B., in this case all proceedings, trials, convictions, and judgments are void for want of a proper authority in the Commissioners; it being a high misdemeanour in the Judges, and little, if anything, short of murder if a person be executed."<sup>3</sup>

27. The qualification of every Officer as to the date and nature of his Commission, as of three years for a General Court, and of the Army or Militia<sup>4</sup> Service (as the case may be) should be observed in the formation of Courts for the trial of such offenders. The trial of an Officer by any other than a General Court,<sup>5</sup> or of a Militiaman by Line Officers,<sup>6</sup> is not, I apprehend, an objection of personal privilege, which, like that of Peerage, may be waived by pleading to the charge before the Court.<sup>7</sup>

28. In the event of reasonable doubt, the President would do well to transmit the question to the Convening Authority for the decision of the Secretary of State,<sup>8</sup> under whose Countersign the Royal Warrant for the Court has been issued. In former instances (the last being that of General Ross<sup>9</sup>), the papers were transmitted to the Judges, and now they would probably be sent to the Law Officers of the Crown for their advice; the Court being adjourned and the Prisoner remitted to arrest, until, by the reassembling of the Court, he can either be discharged or tried.

<sup>1</sup> A third Commander, in addition to two who were required, was held to vitiate the sentence of a N. C. M., Vol. ii. Ad. Op. 431; but the Court was reconstituted for his trial, p. 432.

<sup>2</sup> See Bk. II. Chap. I. sec. 3.

<sup>3</sup> See opinion of twelve Judges on N. C. M. not legally constituted, Vol. i. Ad. Op. 238. Mr. Perceval, in 1798, advised that the proceedings were null, and the prisoner might be again tried. Vol. ii. Ad. Op. 42; *Smith v. Shaw*, 12 John Rep. 266; *Wise v. Withers*, 3 Cranch Rep.

<sup>4</sup> *Martin v. Mott*, 12 Wheat. Rep. p. 35.

<sup>5</sup> Vol. i. M'Ar., pp. 238-248.

<sup>6</sup> Par. 26 and Fors. Cons. Law, p. 197.

<sup>7</sup> 12 Haw. P. C., Bk. 2, Chap. lxiv. sec. 19; *Brooks v. Davis*, 17 Pick. Rep. 149.

<sup>8</sup> In Naval Courts to the Admiralty Secretary.

<sup>9</sup> Vol. I. p. 180.

29. But assuming the Court to be legally constituted, then, as the Prisoner seldom has the aid of legal advice, the President should consider the question of Jurisdiction dealt with in a former<sup>1</sup> chapter. The objection to the trial of the Prisoner may be:—

(c.) Of status, viz. that he is a civilian or otherwise not amenable to the Court, which if sustained would render illegal all future proceedings. No Court can give itself, by an erroneous decision,<sup>2</sup> a Jurisdiction which the Law does not confer. The consequences of this blunder (as distinguished from that to be presently mentioned) would therefore be to make all those members of the Court acting without Jurisdiction responsible both civilly and criminally for their sentence.

30. (d.) Or granting the Prisoner's Military status and general liability, still he may show that the Court would not rightly exercise its Judgments in taking cognizance of the particular offence with which he is charged. Now upon this point, always assuming that the Judges act in a spirit of *bona fides*, their decision if erroneous would not render them liable to trespass or prosecution.

"A Commission of the Peace," wrote Lord Hale,<sup>3</sup> "extends not to treason, neither can the Justices hear and determine all treason by force of their Commissions, for it extends only to felonies.<sup>4</sup> If they take an indictment of treason and give judgment, this is most certainly erroneous; but I do not think it makes them guilty of murder, for they were not without some colour of proceeding therein, because all treason is felony, and the King may, if he please, proceed against a traitor for felony."<sup>5</sup>

"Although in this country," said Lord Loughborough,<sup>6</sup> "all the delinquencies of Soldiers are not triable by Court-martial, but where they are ordinary offences against the Civil peace they are triable by the Common Law Courts;" yet, in some

<sup>1</sup> Chap. VI.

<sup>2</sup> *Bunbury v. Fuller*, 9 Exch. Cas. 140.

<sup>3</sup> 2 Pl. of Cr., Chap. xlii. p. 497.

<sup>4</sup> If he pleaded Guilty, should this preclude him from taking any future objection? as it would protect the Officers of the Court under the maxim, "*quod volenti non fit injuria*." *Shoemaker v. Nesbit*, 2 Rawle Rep. 203.

<sup>5</sup> *Basten v. Carew*, 3 B. & Cr. 653.

<sup>6</sup> *Grant v. Gould*, *sup.*



instances, the Military and Civil Courts may be said to have a quasi-concurrent<sup>1</sup> jurisdiction for the punishment of offences, which according to the aspect in which they are viewed may be either Military or Civil.

31. But the Prisoner may have doubts which either at this or at a later period he may take a legal method of solving, by applying to the Queen's Bench for a Writ of Prohibition, commanding the President and Members of the Court to cease from the prosecution of the trial, upon the suggestion that the cause originally, or some collateral matter arising thereon, does not belong to Court-martial Jurisdiction, but rather to the cognizance of some other Court.<sup>2</sup> "This Court," speaking of a Court-martial, said Lord Loughborough, in *Grant v. Gould*,<sup>3</sup> "being established in this country to preserve law, the proceedings of it, and the relation in which it stands to the Courts at Westminster, must depend on the same rules with all other Courts which are instituted and have particular powers given to them, and whose acts therefore may become the subject of applications to those Courts for a prohibition. Naval and Military Courts-martial, Courts of Admiralty and of Prize, are all liable to the controlling authority which the Courts at Westminster have from time to time exercised for the purpose of preventing them from exceeding the Jurisdiction given to them, the general ground being an excess of Jurisdiction where they assume to act in matters not within their cognizance."

32. The points, therefore, that may be raised upon Prohibition are mainly two: 1st, Is the Prisoner one over whom, in the words of the Mutiny Act, the Court-martial has jurisdiction? 2ndly, Is the offence charged against him one for which he is amenable to a Military tribunal? The Court-martial may be proceeding without jurisdiction over the Prisoner or in error; when, in either case, his discharge from Military arrest would follow as a consequence.

33. But the Court being properly formed and acting within

<sup>1</sup> *King v. Solguard*, Andr. 231, and 2 Str. 1097: Vol. ii. Ad. Op. 127.

<sup>2</sup> 3 Steph. Com. p. 703.

<sup>3</sup> 22 H. B. p. 102.

its Jurisdiction, the members are exempt from actions at Law for what they may do or say as such. "It is essential in all Courts," said Chief Baron Kelly, in a late case,<sup>1</sup> "that the Judges who are appointed to administer the Law should be permitted to do so under the protection of the Law, independently and freely, without favour and without fear. This provision of the Law is not for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the Public, whose interest it is that the Judges should be at liberty to exercise their functions with independence, and without fear of consequences." When Sir John Moore, as President of a Court, was sued for words spoken by him, declaring the charge to be groundless and malicious, Sir James Mansfield, who was the presiding Judge at the trial of the cause, held that the words complained of formed part<sup>2</sup> of the Judgment of acquittal, and therefore that no action could be maintained against the Defendant.

34. So, also, these Courts have certain Statutory, though few of those powers which are customary or incident to the Common Law Tribunals. Having the power to fine and imprison, they are (I presume) Courts<sup>3</sup> of Record and of competent Jurisdiction for the trial of all matters of Fact or Law coming before them.<sup>4</sup> They are neither Common Law nor Civil Law Tribunals,<sup>5</sup> but regulated by a practice of their own, to which the legal maxim "*Cursus curiæ est lex curiæ*" applies.<sup>6</sup> They are open<sup>7</sup> Courts to all persons other than the

<sup>1</sup> *Scott v. Stansfeld*, 3 Ex. (L. R.) p. 220, and *Kemp v. Neville*, 10 C. B. (N. S.) 549.

<sup>2</sup> *Jekyll v. Moore*, 2 Bos. and Pul. (N. S.) p. 342, and *Dawkins v. Paulet*, 9 B. and S. p. 770.

<sup>3</sup> *Lord Holt, Grenville v. Coll. of Physicians*, p. 389 *sup.*; *Wilson v. John*, 2 Bain Rep. 215; *Fox v. Wood*, 1 Rawle Rep. 146; *Hutton v. Blaine*, 2 S. & R. 77; 3 H. D. (O.S.) 859; and may be pleaded as an estoppel, 2 Sm. L. C. 631 (4th ed.).

<sup>4</sup> *Rex v. Suddis*, 1 East. Rep. p. 306; *Miller v. Knox*, 4 Bing. N. C. p. 576.

<sup>5</sup> The Duke wrote to the same effect, but referring (I think) to the Portuguese system. Vol. iv. Gur. Desp. p. 54.

<sup>6</sup> See Lord Eldon's opinion in Vol. I. Ad. Op. 263; *Lord Thurlow, ib.* p. 170, and *Lord Loughborough, ib.* 235.]

<sup>7</sup> Vol. I. p. 160. A Witness remaining after an order to withdraw would be guilty of Contempt, but he must be heard as Witness. Vol. ii. Tay. Evid., p. 1210. So in Naval practice, Ad. Reg. p. 99.

Witnesses (who are usually ordered to withdraw),<sup>1</sup> and the discretion which every Court may exercise of excluding Public when necessity requires it. "In many cases," said I Tenterden, "it will be impossible that a proceeding should be conducted with due order and solemnity, and with the effect that Justice demands, if the presiding Officer has not the control of the proceedings, and the power of admission and exclusion, according to his own discretion."<sup>2</sup>

35. It is within the competency of the Court, before entering upon the trial,<sup>3</sup> to postpone it upon a proper application being made, and cause shown on affidavit. In the Civil administration of Justice this arises where it is shown that without fault in the applicant a material Witness is absent, or unable to attend, or may be secured if the hearing of the case be fixed for a later and definite period. Delay at the instance of the Prosecution entails other considerations, the Prisoner being in custody, and where the application is made on the Prisoner's behalf.<sup>4</sup> If a case having begun, the adjournment may be made for the illness of a<sup>5</sup> member of the Court, or of the Prisoner; but a postponement to get up evidence which ought to have been ready at the opening would not be regular. As the time of sitting is Statutory,<sup>6</sup> it must be strictly noted on each day, to secure regularity of their proceedings.

36. It is in the exercise of a similar power,—that of regulating their own proceedings,—that barristers and attorneys of the Superior Courts at Westminster are excluded from practice before Courts-martial. "If," said the late Sir Willoughby Gordon,<sup>7</sup> "this established principle and usage of Courts-martial be departed from in favour of an Officer, it must be equally extended to the Non-commissioned Officers and Privates."

<sup>1</sup> To prevent collusive evidence, where the Witnesses come from the Company or Regiment. When Sullivan wrote, no party could examine his Witnesses, "lest it should lead to answers concerted for establishing guilt or innocence" (see p. 35). <sup>2</sup> *Garnett v. Ferrand*, 6 B. & Cr. p. 628.

<sup>3</sup> Vol. ii. *Tay. Evid.*, p. 1194. The temporary illness or insanity of a Witness is a good cause. <sup>4</sup> Vol. ii. *M'Ar.*, pp. 27-366; *Simmons*, p. 209.

<sup>5</sup> In America the adjournment of Court for illness of members sanctioned in 1842, *Legare*, Vol. iv. *Attorney-General's Opinions*, p. 18.

<sup>6</sup> See *Mutiny Act*, 1689, and 160 *Art. of War*, 1872.

<sup>7</sup> *Memo. of 1846, Court-martial Inquiry*, 1869, p. 247.

throughout every part of Her Majesty's possessions abroad and at home." "This," wrote the author<sup>1</sup> of the 'Essay on Military Law' (himself the Judge Advocate of North Britain), "is a most wise and important regulation; nor can anything tend more to secure the equity and wisdom of their decisions; for lawyers being in general as utterly ignorant of Military Law as the members of Courts-martial are of Civil Jurisprudence and the forms of ordinary Courts, so nothing could result from the collision of such jarring and contradictory Judgments but inextricable embarrassment, or rash, ill-founded, and illegal decisions."

37. Neither is this rule without analogy in the Common Law, where Magistrates have excluded practitioners from their Courts, and for the same reasons that have induced Military Tribunals to do so. The question raised in *Collier v. Hicks*<sup>2</sup> was, whether any one was entitled as a matter of right to attend on the part of a Prisoner and take part in the proceedings as an advocate, by expounding the Law and examining the Witnesses. "This was," said Lord Tenterden, "undoubtedly an open Court, and the public had a right to be present as in other Courts; but whether *any* persons, and *who*, shall be allowed to take part in the proceedings must depend on the discretion of the Magistrates, who, like other Judges, must have the power to regulate the proceedings of their own Courts. Any person, whether he be a professional man or not, may attend as a friend, may take notes, may quietly make suggestions and give advice; but no one can demand to take part in the proceedings as an advocate contrary to the regulations of the Court. It may be said that a denial of this right will be a hardship on the parties. I cannot accede to that opinion: on the contrary, I think it may be for the benefit of the parties that such a right should not be admitted. If the informer may as a matter of right demand that a professional advocate shall be heard for him, the accused must have the same right. The consequence would be that the parties would in most cases be put to a heavy and grievous expense."

<sup>1</sup> Tytler, p. 250. Unless practitioners in the English Courts, confusion would ensue. See par. 53.

<sup>2</sup> B. and Adol. p. 668, Cox v. Coleridge, 1 B. & Cr. 50; and see 34 & 35 Vic. c. 37, sec. 6.

38. A Military Court has no power of awarding damages<sup>1</sup> or legal costs, and therefore no encouragement ought to be given to any persons to incur them. Moreover, if any Court ought to be entirely self-dependent and able to exercise its functions on the spur of the moment, without instruction or advice *ab ultra*, it should surely be that Court which, from the necessities of the case, may be summoned at any moment, in the field or in quarters, in any part of the world, and to adjudicate upon any offence—Civil, Criminal, or Military—under ordinary or Martial Law. Once train the Officers of the Army to the belief that they are incompetent to discharge Court-martial duties, and the Courts themselves ought then to be suppressed altogether, and their Jurisdiction handed over to Camp or Cantonment Magistrates.

39. The Court being formed, its proceedings are protected from disorderly interruption. By the Articles of 1666,<sup>2</sup> the use of menacing words or gestures was punishable with death, and by those in force with such punishment as the Court should think fit.<sup>3</sup> The Articles of 1717 are silent on the subject, but those of 1748<sup>4</sup> gave a discretionary power of punishment for words or threats, disorder or riot. This punishment could, it is presumed, be inflicted by Court-martial upon those only who are subject to Military Law; and the present Articles of War direct the punishment of Civilians by the Common Law Tribunals.<sup>5</sup> In 1811, when the acting Judge Advocate applied to the Judge Advocate General (Mr. M. Sutton) for his advice as to the means which should be used to protect the Court from insult, "the only reply that he could return" was that it was the duty of the Court "to take care that their proceedings were not interrupted, and, if no other measures were left them for the

<sup>1</sup> Vol. ii. M'Ar., p. 220. As to a Naval Court, 17 & 18 Vic. c. 104, sec. 263.

<sup>2</sup> Sec. 13, Art. 10.

<sup>3</sup> Art. 161. It would appear that the Court has no summary power of punishment, for in December 1848, when the prisoner on trial struck a witness (his Superior Officer) as he was giving his testimony, and the Court decided upon inflicting summary punishment of transportation for this offence,—the Duke of Wellington was obliged to pardon the offender, because the sentence was illegal, the man having neither been arraigned nor tried for the crime for which he had been sentenced. Lord F. Somerset to Lt.-Gen. Berkeley, dated 9th April 1849.

<sup>4</sup> Sec. 15, Art. 17.

<sup>5</sup> Art. 161 of 1872.

protection of order, that they must resort to force : they must commit any military man to the custody of the Provost, and send any other offending individual before a Magistrate for committal and subsequent indictment by the Judge Advocate."<sup>1</sup>

40. The publication of its proceedings during the sitting is also within the control of the Court. In General Murray's case, the Witnesses being ordered for examination separately and apart from each other, the Court appealed to the Secretary at War, showing that this order was defeated by the retail of the evidence in the daily prints, and Lord Kenyon<sup>2</sup> advised the Crown thus : "I think it will be prudent for the President of the Court-martial to express to the audience to-morrow the opinion the Court entertains of the bad consequence of those publications, and notice in writing should be immediately given to the publishers of the several papers that they must not persist in publishing an account of what passes, and in case they shall continue to publish after this caution, I think it will be proper to proceed criminally in the Court of Queen's Bench."<sup>3</sup>

41. It is essential that the Prisoner should be present in Court throughout the hearing of the Case against him, it being a rule of the Law of England that no one should be tried for life or limb except in the presence of his accusers.<sup>4</sup> Further, that the charges against him should be clear and definite, with such dates and circumstances that the accused may know what act or word he has to answer for, and what crime to explain away or extenuate. In Military, possibly more than in Civil, Law, intention<sup>5</sup> is the essence of crime, and though a vicious will be no crime in the Civil, it may (by vicious words, and without overt acts) soon become one in the Military Code.

42. The President should therefore see that the charges are clear and intelligible, that the Prisoner has been furnished with

<sup>1</sup> 19 H. D. (O. S.) p. 96.      <sup>2</sup> Vol. I. p. 516, and Hough (1825), pp. 449-51.

<sup>3</sup> As to fine and imprisonment for contempt in disobeying such an order from a Superior Court, see *King v. Clements*, 4 B. & Ald. 218.

<sup>4</sup> For though the Court may assess a fine, it cannot award corporal punishment. Vol. ii. Haw. R. C. Bk. ii. ch. 48, sec. 22. The Prisoner would be removed from the Court if he prevented its proceeding. *Rush's Case*.

<sup>5</sup> *Adye*, pp. 208-211 ; G. O. 14 Sept. 1811.

them and with the names of the Witnesses, and such other information preceding the trial as the customs of the Service and the Queen's Regulations entitle him to. Amendments of charges during a trial are not to be encouraged, nor can they be often needed, for the Court of Queen's Bench does not expect the same legal exactness in a Court-martial charge as in an indictment. No amendment in an indictment should ever be made at Law where the Defendant can be thereby prejudiced in his defence *on the merits*,<sup>1</sup> nor should any such amendment be made to a Court-martial charge.

43. "Almost all crimes are simple," said the late Deputy Judge Advocate General, speaking as a witness before the Court-martial Commissioners in 1868;<sup>2</sup> "but Military crimes are especially simple." Therefore no elaborate system of pleading is needed; but under any circumstances, whether Guilty or Not Guilty be pleaded (the Defendant standing mute being equivalent to "Not Guilty"), the Court must hear and record the evidence (with the Prisoner's defence, if any), for the information of the Convening and Confirming Officer.<sup>3</sup>

44. But if the Defendant pleads "Not Guilty," he may, under that plea, show any valid objection that would avail for his defence; as, the Statute of Limitations,<sup>4</sup>—condonation of the offence,—that he is not amenable to the Court, either in regard to its constitution or to his *status* as a Civilian,—or to his crime as not cognisable by a Military Tribunal.

45. One plea or objection on behalf of the Prisoner would appear to call for some special remark, viz., that made under the 14th Section of the Mutiny Act, which is founded upon the old legal maxim, "*Nemo debet pro una et eadem causa bis vexari.*" In America, it would seem, that a second, or new

<sup>1</sup> Reg. v. Sturge, 3 E. and B. p. 734.

<sup>2</sup> 2nd Rep. p. 12.

<sup>3</sup> So also in America, evidence, though defendant pleads guilty, should be given, 1834. Butler, Vol. ii. Attorney-General's Opinions, p. 637.

<sup>4</sup> In England (by Sir James Wallace in 1781) and in America it has been laid down that the Court-martial has no jurisdiction after this limitation has expired (1820, Wirt, Vol. i. Attorney-General's Opinions, p. 383; 1853, Cushing, Vol. vi. *ib.*, p. 239, and that the objection cannot be waived by Prisoner, *ib.*) If proceedings are instituted before, but then adjourned and tried after the period of limitation, they are valid. 1854, Vol. vi. *ib.* p. 507.

trial may take place with the assent of the Prisoner, but the first trial referred to in the Act must—drawing from the analogy of the Common Law—be one that was carried through to Sentence and Confirmation. “The only pleas,” said Lord Justice Erle,<sup>1</sup> “known to the Law, founded upon a former trial, are pleas of a former conviction, or a former acquittal for the same offence: but if the former trial has been abortive, without a verdict—there has been neither a conviction nor an acquittal, and the plea could not be proved,—that which would be a matter of plea to a fresh indictment would be a ground of error upon a second trial on the same indictment. As far as relates to the former abortive trial, nothing which then took place could be ground of error on the second trial on the same indictment, unless it would have been a bar, by way of plea, to a new indictment for the same offence.” The offence must also be substantially the same: and as Court-martial proceedings are not guarded by definite pleadings,<sup>2</sup> nor is the Record so accurate an evidence as that of a Criminal Court, to determine the identity of the crime, the Court must act with caution, if the facts bear a close resemblance to those detailed in the former trial. If the former trial was stopped by failure of members, the Prisoner might be brought to trial again;<sup>3</sup> but if the Court were dissolved by order of the Crown, that would possibly be held to be equivalent to the entry of a *Nolle*

<sup>1</sup> These points have been ruled in America:—

1) That a second trial may be had on the Prisoner's own motion. 1818, Wirt, Vol. i. Opinions, p. 233.

(2) That a plea of *autrefois acquit* is the privilege of the accused, which he may waive. 1818, Wirt, Vol. i. Attorney-General, p. 233. (In a Civil Court, see 1842, Legare, Vol. iii. *ib.* p. 749.)

(3) That a plea of former arrest and discharge is bad. 1819, Wirt, Vol. i. p. 294. <sup>2</sup> *Winsor v. the Queen*, 7 B. and S. p. 590.

<sup>3</sup> See the cases decided in the American Courts cited, Benedict, p. 113.

<sup>4</sup> *Ib.*, or withdrawal of the charge? p. 119. Where a Naval Court-martial had acquitted a prisoner under mistake the Admiralty were advised that he could not be again tried (Vol. I. p. 423); *Spen. Perceval*. But where the finding of the Court was illegal and void, the Commanding Officer (contrary to the opinion of the Admiralty Counsel) thought he could be tried (citing *Rex v. Huggins*, 2 Ld. Ray. p. 1584-5; Vol. IV. *ib.* p. 407 (16th Aug. 1818) (see Chap. X. par. 1). So also where the first Court had been illegally constituted (July 1828). Vol. II. p. 132, and Vol. III. p. 117.



*prosequi*, or a condonation equivalent to a former acquittal of the Prisoner.

46. But though the Court be formed, and seised of the legal controversy raised by the charge and plea thereto, no doubt can (I apprehend) exist, that the Tribunal may be dissolved at any time, and the Prisoner released or remitted to custody, by order of the Crown—if not of the Convening Authority. In all Criminal matters before a Civil Court of Judicature, the power of the Crown to enter a *Nolle prosequi*, and thereby to stay proceedings, is undisputed.<sup>1</sup> Though whether the Prisoner may or may not be tried again for the same offence, has not been so absolutely determined. To set a Military Court in motion without the power to stay its proceedings, until, upon completion, they come to the Convening Authority to disallow, would be futile. Here, as in America,<sup>2</sup> this power would be exercised at any time after the Court was formed, and before its proceedings had terminated—if Justice required it.

47. A coercive power to secure the attendance of Witnesses before a Court-martial was first introduced into the Mutiny Act of 1800<sup>3</sup>—being taken from the Irish Act, at the instance of Sir Charles Gould, then Judge Advocate General. The Witnesses are to be summoned by the Judge Advocate to a General, by the President to other Courts, and are liable to attachment in the Queen's Bench, upon complaint of non-attendance, in like manner as any Witness neglecting to attend a trial in any Criminal proceeding in that Court. Protection from arrest was also given to Witnesses in going and returning from a Court-martial, in like manner as Witnesses attending any of the Courts of Law are privileged. These provisions continue in the present Military Code.<sup>4</sup>

48. Where a proposed Witness is in legal custody of a Civil or Criminal Court, such a summons as that adverted to in the last paragraph, would not avail. A Military Prisoner can be brought up by order of the Military Authorities. A Prisoner

<sup>1</sup> The Queen v. Allen, 1 B. and S. p. 855.

<sup>2</sup> Benét, p. 107, but see Sec. 100 Mutiny Act, 1872.

<sup>3</sup> 39 & 40 Geo. III. c. 27, sec. 12; Book (724), p. 123; and see Sullivan, p. 65. Mutiny Act, sec. 13.

of War can only be brought up under orders of the Secretary of State,<sup>1</sup> or one for high treason, with the sanction of the Attorney-General.<sup>2</sup> In ordinary Civil or Criminal custody, in England, resort must be had to one of the Superior Courts for a Writ of *Habeas Corpus* under the 43 Geo. III. c. 140, an Act which was passed at the instance of Mr. Justice Laurence, towards the close of the Session in 1803,<sup>3</sup> and remains unrepealed.

49. But though the Witnesses were before the Court, it had no coercive power either to compel them to be sworn, or, when sworn, to give their testimony. "It is strange," said Sir James Mansfield, in *Moore v. Bastard*,<sup>4</sup> "that Courts-martial should think themselves authorized to commit persons for perjury or other offences than those upon which they had themselves the power of deciding and punishing; for it had been again and again decided" (as the Defendant's Counsel stated in *Warden v. Bailey*),<sup>5</sup> "that though Acts of Parliament give power to Courts-martial to compel the attendance of Witnesses, yet, when they do attend the Court, cannot compel them to speak or commit them for a contempt."

This defect continued till the year 1830, when, by amending the 15th Section of the Mutiny Act,<sup>6</sup> Witnesses who refused to be sworn, or, being sworn, to give evidence, or to answer all such questions as the Court might legally demand of them, were rendered (as they continue to be) liable to attachment in the Superior Courts.<sup>7</sup>

50. The testimony that is to be received against the Prisoner must be given under the sanction of an oath or affirmation.<sup>8</sup> This was provided by the Articles of 1666,<sup>9</sup> which authorized the Judge Advocate "to send for Witnesses, and to administer an oath, in order to the examination and trial of all offences." The Articles of 1672 were silent on this subject; but those of 1717<sup>10</sup>

<sup>1</sup> *Furly v. Newnham*, 2 Dougl. Rep. p. 419.

<sup>2</sup> *Langston v. Cotton*, Peake's A. C. p. 21.

<sup>3</sup> Book I. p. 155.

<sup>4</sup> Vol. ii. M'Ar. C. M., p. 199.

<sup>5</sup> 4 Taunt. Rep. p. 76.

<sup>6</sup> 11 Geo. IV. c. 7.

<sup>7</sup> As to award of fine and imprisonment for refusal to answer as a Witness before a Superior Court, see *Ex parte Fernandez*, 10 C. B. (N.S.) 3.

<sup>8</sup> 24 & 25 Vic. c. 66, and par. 17 *ante*, and sec. 6 of Court-martial Procedure (in Appendix).

<sup>9</sup> Sect. 3, Art. 5.

<sup>10</sup> Art. 22.

directed "that all Witnesses should be examined upon oath." In the Articles of 1748, and down to 1805, the oaths were imposed only in cases before General Courts; but in the year 1805<sup>1</sup> (against the advice of many General Officers, including the Duke of Wellington), Parliament for the first time imposed oaths upon the Judges and Witnesses in Regimental Courts.<sup>2</sup>

51. The punishment for Perjury should have been left with the Civil Court ("the oath<sup>3</sup> being taken in a judicial proceeding before a competent Jurisdiction, and material to the issue"); but, to retain the power of punishment over the Soldier in the hands of the Military Tribunals, Perjury—when committed—was dealt with under the Mutiny Act as an "immorality,<sup>4</sup> misbehaviour, or neglect of duty," and visited with corporal punishment by sentence of a General Court-martial. However, in 1809, any one taking a false oath under the Act was declared—by the 118th Section<sup>5</sup>—punishable on conviction, for wilful and corrupt Perjury; which continues to be the present law.<sup>6</sup>

52. The manner in which the Witness gives his evidence is by *vivâ voce* examination, conducted through the President; who, like a Judge at Nisi Prius, exercises, with the concurrence of the other Members, a legal discretion in case of controversy as to the questions that shall or shall not be put to and answered by the Witness;<sup>7</sup> but both question and answer must be placed on the Record for the information of the confirming Officer.

In earlier times the evidence was in many cases (civil rather than criminal) taken by affidavit, sworn before the Judge Advocate General; and by the American Code at the present day, as in the Portuguese Code during the Peninsular War,<sup>8</sup> in the trial of cases not capital, the deposition of Witnesses not in the Army may, and might, be taken before some Justice of

<sup>1</sup> 45 Geo. III. c. 16, sec. 17, and 47 Ann. Reg. p. 54; 3 H. D. (O.S.) 859.

<sup>2</sup> Vol. II. p. 662.

<sup>3</sup> Vol. I. p. 523, and *King v. Aylbil*, 1 Ter. Rep. p. 69. *Regr. Heane*, 4 B. & S. 958.

<sup>4</sup> Vol. I. p. 523.

<sup>5</sup> 49 Geo. III. c. 12.      <sup>6</sup> Sec. 96 of 1872.      <sup>7</sup> Vol. ii. *Tay. Evid.* p. 1209.

<sup>8</sup> Vol. vi. *Well. Desp.* p. 354; and see Chap. XII. par. 21.

the Peace and used in evidence, provided the Prosecutor and person accused be present at the taking of the same, or duly notified thereof.<sup>1</sup> During the Peninsular War the suggestion to take depositions or affidavits was made by the Duke of Wellington, and the Cabinet went so far as to frame clauses to carry it into effect, but other than in his Despatches I find no trace of these papers.<sup>2</sup>

53. No doubt each Witness gives his evidence under the same conditions that would attach to him if examined in any other Court of competent Jurisdiction. He would not in any Court be bound to criminate himself; nor would he be liable, at the instance of a third party, to an action for slander or libel for anything that may have been said or written by him as a Witness.<sup>3</sup> His competency and credibility should also be tested by the same rules of evidence that prevail in the Superior Courts (whether dependent on the authority of the Judges of those Courts or of the Statute Law) of England; as it was thought that the better opinion would seem to be "that the Mutiny Act neither expressly nor by necessary implication requires Courts-martial to follow the English Law of Evidence."<sup>4</sup> It should never be forgotten that the object of the rules of evidence, like those of logic, is to facilitate the inquiry after truth. What is or is not evidence in each particular case must, however, be decided at the time by the presiding Judges.<sup>5</sup> The subject is entered into with much learning and accuracy in a note found in the Appendix I., in addition to which a few sentences from the work of an able legal writer may be of some practical utility.

54. "A fact must be established by the same evidence which is to be followed by a criminal or civil consequence. In either mode of procedure the following rules obtain:—that the proofs must be relevant to the issue,<sup>6</sup> that the best evidence which the

<sup>1</sup> 74th Art. of War, quoted by Col. Benét, p. 126; and Vol. ii. Tay. Evid. pp. 465-471.

<sup>2</sup> Vol. vi. pp. 277, 351, 359.

<sup>3</sup> *Dawkins v. Rokeby*, 8 L. R. (Q. B.) 262.

<sup>4</sup> Bk. J. p. 119. See the contrary view stated in Simmons (1873) par. 810.

<sup>5</sup> Vol. i. Tay. Evid. p. 31.

<sup>6</sup> Mr. Pitt Taylor, in his *Work on Evidence* (1872), lays down these four general rules, and the principles upon which each is to be supported:—

"1stly. (a) That the evidence must correspond with the allegations, but—

nature of the case will admit of must be given, that secondary evidence will only be receivable where the best and most direct evidence cannot be had; that hearsay is not in general admissible as evidence, because the individual whose words are spoken was neither sworn nor cross-examined; that evidence made by a person since deceased, when against his own interest or made in the usual course of business, may be received." In criminal matters especially, "that our Law presumes in favour of the innocence of the accused; that it regards the evidence of accomplices with suspicion; that a confession,<sup>1</sup> whether judicial<sup>2</sup> or extra-judicial, is admissible provided it was voluntary, and must, if admissible at all, be received in its entirety; that a dying declaration may be received in evidence on a trial for homicide where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration."<sup>3</sup>

55. In any inquiry upon professional competency, the evidence of experienced Officers may, it is said, be admissible by the

"(b) The substance only of the issues need be proved.

"(a) As the main object of pleading is to apprise the parties of the specific question in issue, that object would be defeated if parties were permitted to prove facts essentially different from those pleaded.—(Vol. i. p. 214.)

"(b) Allegations of number (as 5 horses or 1) and value (20s. or 20d.) are generally immaterial; but the name or nature of the property stolen or damaged, or of the person injured, is matter of essential description.—(Pp. 271, 275, 277).—*Nash v. the Queen*, 4 B. & S. 942.

"2ndly. That the evidence must be confined to the points in issue as selected by the parties in their pleadings, as those only on which they are mutually willing to rest the fate of the cause: any evidence in support of other facts would be obviously improper.—(P. 284.) Collateral facts, incapable of affording any reasonable presumption as to the issue, are therefore excluded (p. 335); but evidence of the defendant's general good character is admissible in all prosecutions for felony or misdemeanor, though liable to be rebutted by the Crown.—(Pp. 361, 362.)

"3rdly. That the burthen of proof lies on the party who substantially asserts the affirmative of the issue; that is (upon the assumption of innocence) on the prosecutor.—(Pp. 372, 378, 379.)

"4thly. That the best evidence of which the case in its nature is susceptible should be presented.

"This rule is adopted to exclude fraud, which the withholding the best information from the Court would lead to; and where the evidence which is offered indicates the existence of more original sources of information, these must be first exhausted to let in other evidence. Hence the distinction of primary and secondary evidence."—(P. 397; and see Note on Evidence, Appendix I, *post*.)

<sup>1</sup> So in Court-martial practice, *Sull.*, p. 45.

<sup>2</sup> *Reg. v. Coote*, 4 L. R. (Pl.) 607.

<sup>3</sup> *Broom's Commentaries*, p. 999.

Court.<sup>1</sup> A Witness present at the scene of action should state the facts rather than his *opinion* upon them,<sup>2</sup> for *that* would be usurping the functions of the Court. The physical possibility of discharging a duty may in certain circumstances become a matter of fact rather than of opinion, but even so the conclusion from the facts which he proves will surely be as safely drawn by the Court as by the Witness. The opinions of Subordinate upon the conduct of Superior Officers should not be invited; nor would a Witness act unreasonably, if, in such an instance, he threw himself upon the protection of the Court.

56. A Witness may, on behalf of the Public and upon grounds of public policy, decline to make disclosures;<sup>3</sup> but these objections should be raised upon the definite responsibility of some person in authority.<sup>4</sup> All information in a Public Department is in the legal custody, not of the Clerk<sup>5</sup> or Officer who by accidental employment holds such, but of the responsible head or chief. Obviously, therefore, nothing ought to be given out or removed from his department except by his order and direction, for

<sup>1</sup> Vol. vi. M<sup>r</sup>.Ar. pp. 134-155; Adye, p. 190; Tytler, p. 301. Bradley v. Arthur, 4 Bar. and Cr. p. 305; Vol. ii. Tay. Evid. p. 1227.

<sup>2</sup> In judging from acts or words, Mr. Baron Martin in this terse sentence lays down a great truth. "It is the rule of Common Law, as well as of common sense, to look at what is done, not what is said." (Caine v. Coulton, 1 H. and Colt, p. 768.) "Witnesses may lie, but circumstances cannot." (Vol. i. Tay. Evid. p. 80.)

<sup>3</sup> In the following dialogue, taken from the public prints, and which astonished some readers, the President, in my judgment, had the best of the legal argument:—

*Extract from 'TIMES,' Megara Court-martial, 16th November, 1871.*

"Mr. Joseph Peters, foreman of boilermakers at Sheerness Dockyard, recalled and examined by the Court.—'I was at Devonport Dockyard in 1864, when the boilers and engines of the Megara were renewed.'

"(The Witness was here told by the President that he need state nothing that would tend to criminate himself.)

"*The Judge Advocate.*—'Or that, as an Official of the Government, it would be impolitic, as concerns the Public Service, to state.'

"*The President.*—'I do not recognise anything of the kind. The Witness is sworn to speak the truth, the whole truth, as far as he knows it.'

"*The Judge Advocate.*—'I am only telling the Witness what is the law of the land.'

"*The President.*—'I do not believe it is the law of the land, nor anything like it.'

<sup>4</sup> See Beatson v. Skene, 5 H. and N. p. 855, where Lord Herbert, as Secretary of State, came to the Court to assert this principle. In Dickson v. Wilton, 1 Fos. and Fin. p. 421, definite instructions were given.

<sup>5</sup> See Lord (Chancellor) Cottingham's remarks in Prince Albert v. Strange, 1 Mac. and Gor. p. 45.

otherwise the ordinary rules of law or rights of property would be violated. When such information is needed, the summons must be left with the responsible head or chief;<sup>1</sup> and he will, should not the public interests be damnified thereby, depute a subordinate to give the Court all the official information, documentary or otherwise, which is right.<sup>2</sup> State documents are not often produced, and therefore extracts or copies are receivable in evidence on the ground of public convenience.<sup>3</sup> In a recent case, extracts from the confidential reports<sup>4</sup> of the General's half-yearly inspection were submitted to the Court in favour of an Officer, where public policy would have forbidden the Secretary of State to disclose the report itself, referring—as it did—to many other persons than the accused.<sup>5</sup> It is perhaps scarcely necessary to say that the evidence must be given before the full Court, and that no individual members can be deputed to attend upon an absent Witness to take his evidence or deposition.<sup>6</sup> In America it has been ruled that no member absent from Court during the examination of Witnesses can take part in the Finding or Sentence.<sup>7</sup>

57. The Court would as a rule act wisely in receiving rather than rejecting doubtful evidence tendered by the prisoner,<sup>8</sup> for irrelevant does not affect the value of relevant evidence;<sup>9</sup> and the Statutory amendments of the Law have been directed to the object of facilitating the reception of Evidence—leaving to the Court a wider discretion in determining the value (if any) to be put upon it. Persons theretofore excluded from interest or moral turpitude may now<sup>10</sup> be heard as Witnesses. Husbands or wives, except in Criminal matters, may give evidence of facts for or against the interest of either;<sup>11</sup> but Pri-

<sup>1</sup> *Legatt v. Tollerrey*, 14 East. Rep. p. 303; *Austin v. Evans*, 2 Man. and Gr. p. 431; *Phipps v. Drew*, 3 Ell. and Bl. p. 437.

<sup>2</sup> *Bentall v. Sydney*, 10 Ad. and Ell. p. 170; *Beatson v. Skene*, 5 H. and N. p. 855. <sup>3</sup> *Eyre v. Palsgrave*, 2 Camp. Rep. p. 606; *Star Eve*, pp. 269-270.

<sup>4</sup> Captain Lake's Court-martial and acquittal, Jan. 1872.

<sup>5</sup> *Horne v. Bentinck*, 2 Bro. and Bing. p. 162.

<sup>6</sup> *Adye*, p. 200.

<sup>7</sup> 1831, *Berrier*, Vol. ii. Attorney-General's Opinions, p. 416; 1842, *Legare*, Vol. iv. *ib.* p. 7. *sed query*; 1855, *Cushing*, Vol. vii. *ib.* p. 102.

<sup>8</sup> See 10 H. D. (3) 601.

<sup>9</sup> *Oldroyd's Case*, R. & R. C. C. 89; and see Lord Loughborough's remarks in *Grant v. Gould*, 2 H. Bla. p. 104.

<sup>10</sup> 6 & 7 Vic. c. 85; 14 & 15 Vic. c. 99, sec. 2. <sup>11</sup> 16 & 17 Vic. c. 83, sec. 1.

soners jointly indicted may not testify the one for the other until one or other pleads or is found guilty.<sup>1</sup> Documents are to be proved without the originals on production by copies authenticated under official seal or certificate.<sup>2</sup> Deeds by proof of handwriting, and handwriting by comparing the disputed with the admitted or genuine writing.<sup>3</sup> The rule that a party shall not impeach the credit of his own Witness by evidence of general bad character is established; but he is allowed to contradict particular statements, inconsistent with facts as he has previously stated them.<sup>4</sup>

58. So soon as the Prosecution has closed, it is the duty of the Court to hear all that the Prisoner has to prove by Witnesses or to say in his defence. "The Laws of God and man," said Justice Fortescue, in *Dr. Bentley's case*,<sup>5</sup> "both give the party an opportunity to make his defence."<sup>6</sup> "It is to be found at the head of our Criminal Code," said Lord Kenyon,<sup>7</sup> "that every man ought to have an opportunity of being heard before he is condemned." "No proposition can be more clearly established," said the late Baron Parke,<sup>8</sup> "than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him." And, lastly, as was laid down in the House of Lords,<sup>9</sup> "It is the very essence of justice that every person should be heard before judgment is given against him." The Courts all firmly adhere to that great principle of justice, that in every judicial proceeding, "*Qui aliquid statuerit parte inaudita alterâ, æquum licet statuerit, non æquus fuerit.*"

59. But in subordination to this principle, the Court, it must be remembered, is one of "discipline and honour." If, however, the necessity of his defence obliges the Prisoner to show that

<sup>1</sup> *Reg. v. King*, 1 Cox Cr. C. p. 232.

<sup>2</sup> 14 & 15 Vic. c. 99.

<sup>3</sup> 28 Vic. c. 18, secs. 7 and 8.

<sup>4</sup> *Ib.* sec. 3.

<sup>5</sup> 1 Str. p. 567.

<sup>6</sup> "I remember to have heard it observed by a very learned man," continued the Judge, "that even God himself did not pass sentence on Adam before he was called upon to make his defence. 'Adam (says God) where art thou? hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same was put to Eve also." <sup>7</sup> *King v. Gaskin*, 8 Ter. Rep. p. 210.

<sup>8</sup> *Bonaker v. Evans*, 16 Q. B. Rep. p. 171.

<sup>9</sup> *Queen v. Saddlers' Company*, 10 H. of L. C. p. 423, and Note in 3 Fes. and Fin. p. 551.



the orders or acts of his Superior were erroneous, he must be permitted to do so, leaving it for the Court to judge how far such error (if proved) may justify his disobedience.<sup>1</sup> So, also, if the motives of the accuser fairly present themselves for consideration in determining the issue, these may be criticised by the Prisoner. The Court in such cases acts rather by way of caution than of interdict:<sup>2</sup> for though allowance must and ought to be made for any one striving to prove his innocence, yet this must be done lawfully, not maliciously; while prejudice would arise in the minds of honourable men (of which the Prisoner should be warned) against any one evading the issue, or shifting it by fixing offence or crime on others, not present to defend themselves.<sup>3</sup>

60. The Defence closed<sup>4</sup>—the Evidence summed up—the Prisoner removed and the Court cleared<sup>5</sup>—the duty of the President is to collect the votes or suffrages of all the members—supernumerary or otherwise on each charge; every one voting as a matter of Military duty,<sup>6</sup> the breach of which would render him liable to Court-martial punishment.<sup>7</sup> It has been a fundamental principle in all Military Codes that, to secure the freedom of Junior Officers, the votes should be taken from the

<sup>1</sup> Bruce cites with approval the Roman Law that visited a successful disobedient act with the punishment of death, p. 230.

<sup>2</sup> Sir John Becket in *Dawson's Case*, cited by Simmons, p. 229. If the Prisoner was restricted in his defence, revision may be ordered. *ib.* p. 362.

<sup>3</sup> Tytler, p. 301. In 1821 an officer was brought to trial and dismissed for words used in his (alleged) defence. Hough (1825) 456, and see Judge Advocate Grant's ruling of 26th May, 1831: "Supposing the prisoner to exercise all reasonable bounds, yet it should be recollected that he is always in the hands of the Court, which may warn, check, or (if necessary) silence him, or may even in the last resort punish him for contempt."

<sup>4</sup> The Defence may render it necessary to recall Witnesses for examination, which may be done. Judge Advocate Grant, 5 Mar. 1831; L. O. to Adm. 30 July, 1835.

<sup>5</sup> In America it has been laid down that no evidence ought to be received after the Court is cleared for deliberation. 1840, Gilpin, Vol. iii. A. G., p. 545.

<sup>6</sup> Simmons, p. 249; N. D. Act, sec. 60.

<sup>7</sup> See in Hough, p. 277-9 the trial of an officer (in 1839) for refusing to vote; referred to in Captain Hule's Evidence before the Court-martial Commissioners, 1868, 2 Rept. p. 65. This was urged as a fundamental principle and as a justification by Col. Croxton for sitting on the Court-martial for Lord Derby's trial (in 1651). Vol. v. St. Tri. 294, and 3rd Rep. Hist. Manu. (1872), p. 90.

youngest up to the eldest member of the Court. In no other way could this freedom be secured; for the service of all Officers upon a Court-martial is, as we have seen, a Military duty discharged under the Mutiny Act, in subordination to the President appointed by the Convening Officer. The votes of the Juniors, unless given before those of their Superiors, might place them in direct conflict with their declared opinions. The decision of the Court is also to be governed by a plurality of votes, with a Statutory quorum in case of Capital crimes. The Articles of 1672,<sup>1</sup> and those in force during the reign of Queen Anne, provided that the President, in case of an equality, should have the casting vote; but no such right was conferred by the Articles of 1717, nor has it been given by any later Code. A Statutory quorum of members must, of course, be secured, to make the decision of the Court valid; and should the votes be equal, the Prisoner is acquitted.<sup>2</sup>

61. It appears to be well settled that the Court, in adjudicating upon the charges, have the whole case<sup>3</sup> between the Prosecutor, the Witnesses, and the Prisoner before them; and are bound, where occasion requires them to do so, to remark on the conduct of these parties, in terms of censure or approval, in giving their Sentence. The non-interference of the Civil<sup>4</sup> Courts is founded upon the consideration that the Military Tribunals have complete seizin of the whole controversy, and both can and will do fair and impartial justice between the accused and his several accusers. If, from any pusillanimous feeling, they fail in their duty in this respect, the interests of the Service are made to suffer in one of the most vital principles of Military Justice. The reputation and honour of the accused are often in the hands of his Judges; and if they shrink from doing Justice to an innocent man against whom dishonour may be *imputed*, it may by their silence be *inflicted*.

62. Upon the term "honourable," as used in an acquittal,

<sup>1</sup> Art. 60; Bruce, 308.

<sup>2</sup> Vol. i. M.Ar. pp. 259, 320, 436; Vol. ii. pp. 273, 371. In Navy (see Ad. Reg. p. 100) the President may ask the members to revise their votes.

<sup>3</sup> Vol. ii. M.Ar. pp. 204, 333-337; Simmons, p. 252.

<sup>4</sup> Sutton v. Johnstone, Jekyll v. Moore, and other cases.

let the words of the Duke of Wellington be noted. "It is difficult and needless at present to define in what cases an 'honourable' acquittal is peculiarly applicable; but it must appear to all persons to be objectionable in a case in which any part of the transaction is disgraceful to the character of the party under trial.<sup>1</sup> A sentence of honourable acquittal should be considered by the Officers and Soldiers of the Army as a subject of exultation, but no man can exult in the termination of any transaction a part of which has been disgraceful to him; and though such a transaction may be terminated by an *honourable* acquittal by a Court-martial, it cannot be mentioned to the party without offence, or without exciting feelings of disgust in others. These are not the feelings which ought to be excited by the recollection and mention of a sentence of honourable acquittal."<sup>2</sup>

63. The members of the Court, as discharging the double functions of Jury and Judge, have to decide on two distinct and separate matters. The first is, to find as a Jury whether, according to the evidence, the Prisoner is or is not "Guilty" on each of the several charges upon which he has been arraigned. In the ordinary rule of the Common Law, the Verdict can only so far affect the Prisoner as it relates to and covers the issue raised by the pleadings: thus, if charged with Murder, a verdict that he had committed Forgery would be avoidable.<sup>3</sup> The Verdict might, however, be general or special that is, either definite on the issue, or special by the statement of an alternative. Thus, where a Jury found a man "Not Guilty" of Murder, they were not bound to inquire whether he was "Guilty of Manslaughter;" but they might do so: for the killing was the substance, and the malice but a circumstance,—a variance as to which did not invalidate the verdict.<sup>4</sup> The Criminal Law has been amended in this direction; for a Prisoner indicted for Felony or a Misdemeanour, may be found not "Guilty," but "Guilty of an attempt" to commit the

<sup>1</sup> The affray in which the Officer's conduct was under notice took place in a brothel in Lisbon. See another case of a drunken riot at Coimbra, Vol. vi. p. 371, and of an Officer charged with making false accusations, Vol. vii. p. 123.

<sup>2</sup> Vol. iii. p. 547.

<sup>3</sup> Vol. i. Hawk. P. C. bk. I. ch. x. sec. 6.

<sup>4</sup> Vol. ii. Hawk. P. C. bk. ii. ch. xlvii. sec. 4.

same, and punished for such attempt: so one indicted for Robbery may be convicted of an assault with attempt to rob. Again, if tried for a Misdemeanour, no acquittal shall be given because the facts prove a Felony. The circumstances in all these cases are substantially the same; and though the crime—as the result of legal enactment—may vary, as each case may be ruled to come under one or other class or category of offences, the Prisoner is really not prejudiced on the merits of the case which he has to answer for, but the administration of Criminal Justice is improved.<sup>1</sup>

64. This principle is not unknown in Military Law,<sup>2</sup> and is found embodied in the present Articles (43). It appears, however, to be more practised in the American Code; and various instances are given by a writer of authority,<sup>3</sup> where the principle is resorted to.

65. After the Finding, but not before, and assuming the affirmative to be found, then the Court, before deciding upon Sentence, as Judges,<sup>4</sup> may, for the “purpose of assisting their discretion in awarding punishment, receive evidence of former convictions against the Prisoner.” The principle involved in this inquiry was first introduced into the Civil Criminal Code by Sir Robert Peel in 1827, when, under the 7 & 8 Geo. IV. c. 12, sec. 11, the Judges were permitted to receive evidence of a previous conviction (by certificate), and award severer punishment than the first committal of an offence would entail on the Prisoner. In 1829, the same principle was introduced into the Military Code by the 88th Article of War, which required (as did all later Articles till those of 1866)<sup>5</sup> that previous notice should be given to the Prisoner that such evidence would be tendered against him. No such notice to the Prisoner is now required by the Military Code; but the evidence is, of course, produced in his presence. The Court is

<sup>1</sup> 14 & 15 Vic. c. 100, sec. 9.

<sup>2</sup> Vol. ii. M<sup>r</sup>Ar. p. 220; Adye, p. 209.

<sup>3</sup> Benét on Military Law (1866), p. 152. In the Navy, see 29 & 30 Vic. c. 109, sec. 48.

<sup>4</sup> Where this evidence was given before the Finding, the Court had to revise their Sentence. Simmons, p. 365. In the Navy Circular, 1871 <sup>(36)</sup> (D. M. M.)

<sup>5</sup> Compare Art. 152 of 1865 with Art. 154 of 1866.

restricted from awarding any other punishment "than may be legally awarded for the offence of which the Court-martial has convicted him."<sup>1</sup>

66. The Sentence, or award of punishment on each separate charge<sup>2</sup> is, therefore, the second and final matter upon which a decision is to be given; and with the discretion entrusted to the Court by the Mutiny Act, no other Court of higher Criminal Jurisdiction will interfere. "It was intended by the Act," said Mr. Justice Laurence, "to give the Court-martial a discretionary power to apportion punishment according to the degree of guilt of the party convicted."<sup>3</sup> Nor can the Crown legally do so; for when, in 1748, it was proposed to prescribe the punishment of death by the Articles of War for desertion—the Mutiny Act having given to the Court-martial an alternative discretionary power of awarding other punishment—the Law Officers<sup>4</sup> (Lord Mansfield being one) advised the Crown that this discretion existed in the Court by statute, could not be taken from the Court by Articles of War, and that the alternative power (notwithstanding the terms in which the Articles of War might be framed) would remain in the Court.<sup>5</sup>

67. A doubt has been suggested, whether those members who voted for an acquittal can legally assign any punishment, or vote on the Sentence. If they practically withdrew themselves from the case, and left the Prisoner in the hands of those members of the Court who took an adverse view of his conduct, they would, I apprehend, neglect their duty. Upon an innocent man, erroneously convicted by the Jury, the duty of the Judge would be to award punishment—though the most lenient which the Law sanctioned; thus, as far as possible, to mitigate the consequences of error, by saving life, or by lightening the Prisoner's sufferings, until, on appeal or pardon, it shall be altogether removed.<sup>6</sup>

68. By the first Mutiny Act, only one punishment—that of death—was named; but a discretion was given to award "such

<sup>1</sup> Art. 154 of 1872.

<sup>2</sup> *Campbell v. the Queen*, 11 Q. B. Rep. 812.

<sup>3</sup> *Rex v. Suddis*, *supra*.

<sup>4</sup> Vol. I. p. 518.

<sup>5</sup> Chap. III. par. 14.

<sup>6</sup> See Vol. i. M'Ar. p. 312; Vol. ii. pp. 312-374; Adye, pp. 212-217.

other punishment as the Court should see fit." This principle of sanctioning the infliction of capital punishment for offences of vastly different moral turpitude, has been continued and extended in the Military Code to the present time, but not without protest or adverse criticism.<sup>1</sup> "One of the greatest advantages of our English Law is, that not only the crimes themselves which it punishes, but the penalties which it inflicts, are ascertained and notorious—nothing is left to arbitrary discretion;"<sup>2</sup> and Sir W. Blackstone, who wrote thus, went on to regret that our Mutiny Act should have been so framed as to confer discretion so arbitrary upon Military Tribunals.

69. Whenever the punishment of death has been awarded, the method of execution has been determined by the Court. The death of an honourable, though misguided man, has usually been that of a Soldier, viz., by being shot; and few readers will forget the anguish of degradation which Major André expressed, when General Washington refused to alter his method of punishment from that of "hanging," to which he had been condemned and by which he was made to suffer. The death of a Criminal for base crimes—as desertion to the enemy, theft, or murder—has been that of hanging.<sup>3</sup>

70. The Corporal Punishments named in the Code of 1717 were the "Wooden Horse," "Pickets," "Running the Gauntlet,"<sup>4</sup> and such "other Corporal Punishment as" was then "practised in the Army for Military offences." These, and any corporal punishments, have altogether ceased, while an express limitation has been placed<sup>5</sup> in the power of a Court-martial, by declaring that no punishment shall be awarded which is contrary to the usages of English Law. The present methods of punishment have, however, been largely extended by enabling the Court to withdraw from the Soldier benefits—which in earlier periods he never had the power to gain, viz., increased pay and rewards for good conduct, which honest and faithful service entitles him to receive.

<sup>1</sup> Vol. I. pp. 152-162.

<sup>2</sup> Commentaries, Vol. i. pp. 414, 415.

<sup>3</sup> Vol. ii. M.Ar. p. 326. The Troops at the Station are always assembled to witness the Punishment, that they may be deterred from the Commission of a Crime for which the offender is about to suffer. G. O. 4 Mar. 1811.

<sup>4</sup> Art. 36.

<sup>5</sup> 1830, Art. 102; and 1872, Art. 115.

71. It has been pointed out at some length elsewhere,<sup>1</sup> that the Court has no power to award costs or pecuniary compensation to one acquitted by the Finding, or to order the payment of Defendant's Witnesses out of the Army Votes. Such a principle exists in the ordinary Criminal Code, and by a recent statute has been considerably increased.<sup>2</sup> The rule of the War Office, as established by Lord Palmerston, and since acted upon, is to allow the Defendant the expenses of Witnesses where he is acquitted of charges preferred against him by the Crown; but not to allow him even these expenses where he is found guilty, or where the charge has arisen out of the personal disputes of Officers.

72. The Finding and Sentence, drawn up and reduced into writing by the Judge Advocate or President,<sup>3</sup> is signed by the latter as the Record of the Court<sup>4</sup> to be transmitted to the Confirming Officer exercising his functions as a Court of Error. Everything therefore that has been submitted at the trial and upon which the Court has given its decision should appear on the Record,<sup>5</sup> for his information. No erasures should be permitted, and all the contents should be so plainly entered as to be easily legible. In a word, the transcript should be as carefully compiled as the circumstances under which the Court was held will allow, and so full as to enable the Confirming Authority faithfully to discharge his supreme duty (as detailed in the next chapter), for which he is responsible alike to the prisoner, to the members of the Court, and to his own conscience.

73. Therefore between the Finding of a Military<sup>6</sup> Court-martial and the Verdict of a Jury one essential distinction is this: That, while in the one case the Finding is necessarily a secret proceeding, not being made known to the Prisoner

<sup>1</sup> Papers printed, 2nd Report Court-martial Commissioners, p. 248.

<sup>2</sup> 30 & 31 Vic. c. 35, secs. 2 and 5; and see Vol. ii. Tay. Evid. p. 1077.

<sup>3</sup> In Naval Courts all the Members sign. Ad. Reg. p. 101.

<sup>4</sup> Where, in the Peninsula, the President of a Court-martial had omitted the formality of signing the Sentence which had been agreed to, and written out—upon his death—the Duke of Wellington ordered the Senior surviving Officer to re-assemble and sign the Record in the presence of the other members of the Court, annexing a minute that he had done so by the orders thereby conveyed to him. Vol. vi. Desp. pp. 61 and 150.

<sup>5</sup> Coffin v. Wilbur, 7 Pick. Rep. 151.

<sup>6</sup> A Naval declares the sentence at once—openly. Ad. Reg. p. 101.

ill confirmed by the Convening Officer, in the other the validity of the Verdict depends upon Publicity,—“It being always greed,” writes Hawkins,<sup>1</sup> “that in all Capital cases, the Jury must give their Verdict openly in Court, and cannot give a *Privy Verdict*.” This rule in Military procedure dates, as we shall see, from William III.’s reign, and continues for reasons perhaps not less forcible now than at the period of its adoption.

74. In cases where the Finding and Sentence are returned to the Court for revision, it may be questioned whether any members—though a legal quorum—other than all those who formed or awarded the prior Finding and Sentence, can legally alter or revise them.<sup>2</sup> According to the ruling of the American lawyers,<sup>3</sup> such revision would be legal, but there would be some risk in so altering a Finding and Sentence, or, indeed, in changing the nature of his punishment, to the prejudice of the Prisoner. Having found a Sentence, and awarded a Punishment, either in the first instance, or on revision by direction from the Confirming Officer, the functions of the Court terminate by an order for its dissolution from the Convening Authority.

75. In the earlier<sup>4</sup> Military Codes, the power of life and death was in the hands of the General; but in later ones,<sup>5</sup> though prior to the Mutiny Act, the President was to pronounce the Sentence when given, and thereupon the Provost Marshal was to “have warrant to cause execution to be done according to the Sentence.”

The Mutiny Act imposed no limitation upon the power of the Court;<sup>7</sup> and hence the Sentence of Death might have been carried into execution at once, without the intervention of the Crown or Confirming Officer, had not William III., by his Articles of War and Warrants convening Courts-martial,

<sup>1</sup> Pleas of Crown, Chap. xlvii. sec. 2.

<sup>2</sup> *Rex v. Kenworthy* 1 B. and Cr. 711; *King v. Bourne*, 7 Ad. and Ell. 60.

<sup>3</sup> 1855, Cushing, Vol. vii. Attorney-General’s Opinions, p. 339.

<sup>4</sup> Benét, pp. 167, 174. See the case put by the Duke of Wellington in July 1815, where the President and members, having passed an illegal sentence, were afterwards killed in action. Vol. xiv. Supp. Desp. 576.

<sup>5</sup> 1629, Art. 21, Chap. i. sec. 17. The same rule existed in the Navy, but the Court gives final judgment under the Navy Discipline Act. Forsyth’s Cases, p. 193.

<sup>6</sup> 1672, Art. 60.

<sup>7</sup> As to the Navy see Chap. III. par. 14.



declared "That no Sentence of Death be put in execution till an account be given to himself, in pursuance of the directions to that purpose in the 52nd Article of War, and his pleasure declared thereupon."<sup>1</sup> Such a limitation was expedient then, whatever it may be now; for—testing the matter by the early Court-martial Records—many lives have been spared by the intervention of a Superior Authority between the Court and the Prisoner. "A measure," wrote Tytler,<sup>2</sup> "of high expediency and good policy, which has often been exercised to the most beneficial ends."

76. It has been already shown that the Marshal's Court held a peculiar Jurisdiction and discharged Judicial functions without being fettered either by forms or liability to have its decisions overruled by other Courts.<sup>3</sup> It may also be noticed that other analogous Jurisdictions "empowered to proceed by methods unknown to the Common Law, having no need for Indictment or formal Judgment,"<sup>4</sup> exist for disciplinary purposes,<sup>5</sup> and that these Courts are not interfered with by the Superior Courts so long as they act within the limits of their own Jurisdiction.<sup>6</sup> Having absolute power to hear and determine the offence,<sup>7</sup> their method of procedure (if accordant with their Charters or practice) will not be set aside for error because not accordant with that of the ordinary Courts of Common Law. However, at this, rather than at a later stage, it is (I apprehend) open to the Prisoner, excepting against the proceedings of the Court-martial, to make application to the Queen's Bench for a Writ either of Prohibition, of *Habeas Corpus*, or of *Certiorari*, to bring the matter in review before the Common Law Courts. For a Prohibition, the two principal grounds have been already stated; but, in addition to these, others were urged, though without success, in *Grant v. Gould*,<sup>8</sup> to this effect:—1. That, contrary to the rules of the Common Law, evidence that ought to have been rejected was received, and that evidence which

<sup>1</sup> Vol. I. p. 503.

<sup>2</sup> P. 339 (ed. 1810).

<sup>3</sup> Chap. II. par. 12.

<sup>4</sup> *Greenvelt v. Burwell*; 1 Lord Ray, p. 469.

<sup>5</sup> Censors of the College of Physicians and University Courts.

<sup>6</sup> Chap. I. par. 33.

<sup>7</sup> *Kemp v. Neville*, 10 C. B. (N.S.), p. 549.

<sup>8</sup> 2 H. B. p. 106.

ight to have been received was rejected by the Court.

That the Prisoner was not, before his trial, specifically charged with the offence of which the Court found him guilty." Not admitting that a Court-martial was bound in all cases to adopt all the distinctions in the Law of Evidence that have been established in the Common Law Courts, or that the Queen's Bench should interfere for error which might be the subject of review or appeal, Lord Langbrough refused to grant a Prohibition. "It would," said the learned Judge, and his words were quoted with approval in 1842 by Lord Denman,<sup>1</sup> "be extremely absurd to expect the same precision in a charge brought before a Court-martial, as is required to support a conviction by a Justice of the Peace."

77. In *Rex v. Suddis*,<sup>2</sup> an attempt was made to induce the Queen's Bench to assume the functions of a Court of Error and reverse the decision of a Court-martial upon two objections. The application was there made for a Writ of *Habeas Corpus* to discharge a Prisoner sentenced by a Court-martial, exercising Civil Jurisdiction in Gibraltar to transportation:—1st, that the offence would not, according to the Law of England, bear such a punishment; and 2ndly, That it did not appear that the Prisoner had been charged with the offence for which he was convicted. It was strenuously denied that the Court-martial had jurisdiction, and a discretionary power to punish the party according to his degree of guilt, and therefore the Court refused to interfere. "It was properly admitted," said Mr. Justice Grose, "that the Court had authority to try the offence, and inflict punishment according to the nature and degree of the offence as regulated by the Law of the territory. We do not sit as a Court of Error. It is not our duty to reverse such a Sentence pronounced by a Court-martial, or to inquire into the offences and to propose a different punishment. As to the rest, we must leave them to their 'omnia rite acta.'"<sup>3</sup>

<sup>1</sup> *Re Poe*, 5 B. and Adol. p. 666.

<sup>2</sup> *Ex parte Fernandez*, 19 C. B. N. S. 372, 12 Jur. 271, 13 L. J. 100.

<sup>3</sup> P. 315.

78. An application, at the instance of an Officer tried in India and cashiered under a Court-martial Sentence, was made in 1861<sup>1</sup> to the Queen's Bench, for a *Certiorari* to bring up (in order to quash) the record of his conviction by Court-martial but without success. Admitting, if Jurisdiction had been assumed by a Court-martial over a Civilian, that the Queen's Bench should interfere, it was very doubtful whether that Court "should do so, unless the Civil rights"—as of life, liberty, or property—"were involved, or where the sentence affected only the Military status of the applicant." "We cannot," said Mr. Justice Crompton, "grant a *Certiorari*, unless we see for what purpose the record is sought to be brought before us. Here the object is only to quash it; *i.e.*, if the Court should appear to have exceeded its Jurisdiction." As the Sentence had been passed and confirmed in India upwards of three years previously to the application being made, the Court unanimously refused to interfere: "nothing but the Military status of the applicant was affected by the decision of the Court-martial; and therefore, in the exercise of their discretion," the Writ was refused.

79. No case appears to have arisen where the maxim "*Consensus tollit errorem*" has come under consideration of the Courts as applicable to Court-martial proceedings.<sup>2</sup> In relation to the Criminal Jurisdiction of these Courts, as affecting life or limb, it can have no application whatever, and but little when a Soldier, acting without advice, waives or consents to any irregularity which, if insisted upon, might have freed him from peril. Other cases, however, may arise, as in the trial of Officers, when their conduct as such is under review, and their status only under adjudication, where the Prisoner (if competent) would gladly consent to accept the decision of the Court, reduced by accident (as a Jury may be) below the legal quorum. Under such circumstances, there seems to be no reason why here, as in America,<sup>3</sup> consent should not avail

<sup>1</sup> *Re Mansergh*, 1 B. and S. p. 405.

<sup>2</sup> On Sir James Murray's case the prosecutor's statement was (with consent) accepted as evidence. Hough, 782.

<sup>3</sup> Waiver and consent to admit evidence given in the absence of the Prisoner and deposition of Witnesses taken abroad, 1824, Wirt, Vol. i. Attorney-General's

in a Military as in a Civil Court;<sup>1</sup> for the pay and service of the Prisoner are matters within his legal competency to resign, without the adjudication of a legal tribunal.

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Opinions, p. 706; Berrien, 1830, Vol. ii. Attorney-General's Opinions, p. 344. So also, as to absence of a Member of the Court, 1855: Cushing, Vol. vii. Attorney-General's Opinions, p. 102.

<sup>1</sup> Reg. v. Sullivan, 8 Ad. and Ell. ii. p. 831; Doe and Ashburnham v. Michael, 16 Q. B. Rep. p. 620; Pryme v. Titchmarsh, 10 Mee. and Wels. p. 605; Andrews v. Elliott, 5 Ell. & Bl. 502.

## CHAPTER X.

THE CONFIRMATION AND EXECUTION OF A COURT-MARTIAL  
SENTENCE.

1. WHATEVER measure of responsibility the Members of the Court may bear towards the Prisoner, for the execution of an illegal Sentence, there can be no doubt that an individual responsibility rests with the Officer confirming the Finding and ordering the Sentence to be carried into execution.<sup>1</sup> "The sentence of a Court-martial," said Mr. Justice Platt of the American Bench,<sup>2</sup> "is interlocutory, and inchoate till confirmed. It is not definitive, but merely in the nature of an inquest to inform the conscience of a Commanding Officer. He alone could not punish without the Judgment of a Court-martial, and it is equally clear that the Court could not punish without his order of confirmation. As well might a justification be set up under an execution issued upon an Interlocutory Judgment and Writ of Inquiry before a final Judgment." Hence the importance of all the incidents of the trial being recorded, "that every thing done may appear and be reviewed by a different tribunal—the General."<sup>3</sup> It, therefore, behoves this Officer before he confirms the proceedings, to act with care at all times, and with the best possible advice in such cases as present any features of doubt or difficulty.

2. And this is the more important from the circumstance

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<sup>1</sup> Haw. P. C. Bk. 1, Ch. x. secs. 4–9.

<sup>2</sup> *Mills v. Martin*, 19 John Rep. p. 30. This must be understood of a Military, and not a Naval Court.

<sup>3</sup> *Coffin v. Wilbur*, 7 Pick Rep. 151, Chap. viii. p. 45. If the sentence be not confirmed, the prisoner is (in effect) acquitted. Hough (1825) 668. The Duke of Wellington in 1833 induced Earl Grey's Ministry to adopt the principle of Revision against that of Finality, 15 H. D. (3) 940.

that—as we have seen, and as mentioned by Hawkins<sup>1</sup>—there is no other appeal against the Finding and Sentence of these Courts, if acting within the limits of their Jurisdiction. The decision of the Confirming Authority is final;<sup>2</sup> and, if wrong, irretrievable, other than as petition—not of right, but for mercy—to the person of the Sovereign (acting not through his Judges, but his political Ministers) may secure relief.<sup>3</sup> The duty of the Confirming Officer is, therefore, one of supreme importance in the Administration of Justice by Court-martial under the Military Code.

3. The Officer who has to discharge this duty ought to be thoroughly independent of the Members of the Court,<sup>4</sup> and he is usually the Military Hierarch by whom the Court (whose proceedings are under review) has been originally convened. Thus in the General Court summoned by the Crown or General in Chief Command, the Confirming Officer is the Sovereign or Commander-in-Chief: in the District the General who convened the Court is the Confirming Officer; and in the Regimental Court the Colonel of the Regiment is the Convening and also the Confirming Officer. Each, therefore, reviews the proceedings of his own Court; and, to assist him in this duty, he may obtain, either directly or through Superior Authority, the responsible advice of the Judge Advocate General upon the whole “Record,”<sup>5</sup> as sent up for confirmation.

4. Formerly, in doubtful cases, of Capital or Penal Sentences, to aid the Confirming Officers, and to free them from all personal responsibility, the practice of the Crown was to refer the Record of the proceedings to the decision of the Twelve Judges. This was done by Order of the Privy Council,<sup>6</sup> communicated to the Lord Chief Justice by one of the Secretaries of State; and their opinion collectively (or individually if

<sup>1</sup> Vol. ii. Bk. 2, Chap. iv. sec. 11. Chap. VII par. 1, *ante*.

<sup>2</sup> In American practice there is no appeal after revision. 1541 Cushing, Vol. vi. Attorney-General's Opinions, p. 329.

<sup>3</sup> 4 Ad. Op. 262; and see this course suggested as the only remedy open upon the exercise of summary power of fine or imprisonment by one of the European Courts. *Ex parte Fernandez*, 10 C. B. (N. S.) 25.

<sup>4</sup> Sir D. Ryder's Report of Sept. 1737, Vol. I. p. 315.

<sup>5</sup> Vol. xiv. Well. Supp. Deap. p. 57<sup>a</sup>.

<sup>6</sup> See Sir James Eyre's Letter of July, 1796, Vol. I. p. 561.

they differed) was transmitted to the Crown through the same channel. Such was the practice till the close<sup>1</sup> of the last century, and as early in this Capital Punishments at home were seldom inflicted by Court-martial Sentences, the necessity for this advice became less urgent, though, unquestionably, the use of it added a great security to the Administration of Criminal Justice by Courts-martial. In the present day the Secretary of State would refer the Record to the Law Officers for Report,<sup>2</sup> and the confirmation would then probably be construed to be an Act of State; so that a *Nolle prosequi* could be entered by the Attorney-General, should a Criminal Prosecution be thereafter instituted against the Confirming Officer.

5. In the administration of the ordinary Criminal Law, the presiding Judge may quash the Indictment,<sup>3</sup> or after the trial for felony, and before recording the verdict, may point out to the Jury objections against it, as being inconsistent with, or contrary to the evidence.<sup>4</sup> When recorded the Judgment may be arrested for faults apparent on or *dehors* the record;<sup>5</sup> or a Writ of Error (by leave of the Crown) may be prosecuted to a higher Court, for substantial errors or mistakes (*e.g.* conviction for one, and punishment for another crime), the Court having the power to adjust the punishment or discharge the prisoners.<sup>6</sup> In analogy to these powers used for the protection of the ordinary Criminal, the Confirming Officer in Military Procedure has the whole record of the Court-martial submitted for his examination. Before approving the sentence, he must satisfy himself that no error exists on these essential points, viz. :—

1st. (a.) The Legal Constitution and (b) the Jurisdiction of the Court in respect to (c) the Prisoner, or the (d) Crime for which he is sentenced.<sup>7</sup>

<sup>1</sup> Captain Coffin's Case was referred in 1790. See Vol. ii. M'Ar., p. 291.

<sup>2</sup> This was done in March 1866, when a Sentence of Capital Punishment was awarded by a Court-martial against a Prisoner.

<sup>3</sup> *Rex v. Philpots*, 1 Car. and Kir. 113; *Reg. v. Heane*, 4 B. and S. 956.

<sup>4</sup> *Haw. P. C. Bk. 2*, Ch. xlvii. sec. 11.

<sup>5</sup> *Ib.* Ch. i. sec. 1.

<sup>6</sup> *King v. Bourne*, 7 Adol. and Ell. p. 66; *Holloway v. the Queen*, 17 Q. B. R. 327.

<sup>7</sup> Chap. VII. par. 26-30.

2ndly. (e) The sufficiency of the proceedings in regard to the Charge and the Evidence (admitted or rejected) in support thereof, and the agreement of the Finding with the Charge.

(f) To the Sentence and those provisions of the Statute Law which justify the punishment (if any) awarded against the Prisoner.

6. The original intention of interposing the authority of the Crown, as Confirming Officer before a Court-martial Sentence was carried into execution, was assuredly one of mercy. Military tribunals were (then, at any rate, if not now) prone to severity, and hence the attribute of mercy was secured to the criminal. The Reports of the Law Officers to George II., printed elsewhere,<sup>1</sup> show clearly this to have been their view. Though it is provided that the Sentence of any General Court-martial shall not be put in execution until report be made of the whole proceedings to His Majesty or the General Commanding-in-Chief and his directions are signified hereupon: yet we conceive that was only intended to give His Majesty an opportunity of extending His Royal Mercy by Pardon or Reprieve.”<sup>2</sup> And again: “According to the principles of the Law of England, the King personally never gives judgment, especially of punishment; for mercy is his proper act.”<sup>3</sup> Looking at it from a Soldier’s point of view, “It is a glorious thing,” said the late Sir John Macdonald, when Adjutant-General, “that the lowest individual in our ranks knows that his case will arrive at the Fountain Head; and that if injustice has been done him, it is perfectly sure to be looked into at Head Quarters,” adding, in confirmation of this assertion, that “the Duke of Wellington constantly takes the Queen’s pleasure about remitting certain portions of the punishment of Private Soldiers.”<sup>4</sup>

7. I. For the discharge of this duty the Confirming Officer, as a check upon the Court, has to satisfy himself on those

<sup>1</sup> Vol. I. pp. 510–520.

<sup>2</sup> Lords Hardwicke and Talbot (then L. O.), 1727, Vol. I. p. 510.

<sup>3</sup> Lord Hardwicke (then Sir P. Yorke), Vol. I. p. 514.

<sup>4</sup> Question 2470, Report on Army Expenditure, p. 850.



points which have received our consideration in the last Chapter.<sup>1</sup> It is needless, therefore, to do more than refer the reader to what has been already written elsewhere.

8. II. In the second inquiry, (e) as to the Finding, the object which must be kept in view is to ascertain whether the Prisoner has had a fair trial upon the merits. Looking at the Record for this purpose, first, as the case was presented against the Prisoner, that the charge has been plain and explicit, the statements of the Prosecutor truthful,<sup>2</sup> the evidence of the Witnesses full and impartial; and, secondly, as presented on behalf of the Prisoner, that all the evidence which he was entitled to from the adverse and other Witnesses has been given, and his Defence has been fairly heard and considered by the Court.

Accepting the Record as sufficient on these points, then the evidence must be sufficient to support—and each “Finding” must be consistent with—each charge. “If Justices of the Peace,” wrote Hawkins, “on an indictment of trespass, arraign a man for felony, and condemn him to be executed, the Justices” are guilty of felony.<sup>3</sup> The Finding, therefore, must not be of a more serious offence than that alleged in the charge.<sup>4</sup>

9. It may also be noticed that, should any recommendations or observations be made by the Court, these should not be embodied in their Finding, still less in their Sentence, but be placed, as a separate Memo., at the foot or end of their Record, or in a letter,<sup>5</sup> addressed to the Confirming Officer, that the proceedings may be confirmed, without thereby adopting these extra Judicial memoranda.

10. III. (f) The “Sentence” must be compared with the Finding and with the Statute Law, to ascertain whether the

<sup>1</sup> Pars. 24–32.

<sup>2</sup> *Rex v. Hartel*, 7 Car. and Pay. 774. Where the Court had examined a Prisoner on trial, the proceedings were held to be void. L. O. to Adm. 22nd Oct. 1850.

<sup>3</sup> The Officers who execute their Sentence would not be guilty, for the Justice had a Jurisdiction over the offence; their proceedings were irregular and erroneous only, but not void. Vol. I. H. P. C.; Book 1, Ch. x. sec. 6; *Hutton v. Blaine*, 2 Serj. and Rawle, 75. <sup>4</sup> Vol. II. Haw. P. C. Book 2, Ch. 47, sec. 3–9.

<sup>5</sup> Vol. v. Well. Desp. pp. 248, 261; 7 *ib.* p. 112.

Punishment as to its extent or nature be consistent with the Finding and within the limits or express terms<sup>1</sup> prescribed by the Mutiny Act with regard to the Regular Army, and by the Militia and Volunteer Acts with regard to the Auxiliary Forces; for as the powers of these Courts over life or limb are purely Statutory (which term extends to the Articles of War so far as they are *intra vires*), the Punishments must be strictly consistent with these enactments,<sup>2</sup> or the Sentence will be void.

11. Now, if not sufficient on these points, the Confirming Authority, having no power to alter the "Record," may transmit it to the President, that the Members of the Court, on reassembling, may, if they see fit, revise their Finding or Sentence upon those points to which the Confirming Officer has directed their attention.<sup>3</sup> They can neither recall evidence nor alter the Record as originally transmitted;<sup>4</sup> but they must supplement it by adding, first, the order for revision, and then a revised—or an adherence to their original—Finding or Sentence. In this manner informalities or irregularities apparent on the Record may be amended, and the Court may, on a review of the *Evidence*, return another "Finding," or of the *Law*, another "Sentence;" but no inherent defect—as want of Jurisdiction, for instance—can be cured by revision. In American practice the presence of the Prisoner is needed,<sup>5</sup> but, as in this country he is not present during the first, there is no reason why he should be so during the second deliberation.

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<sup>1</sup> For instance, "cashiered" or "dismissed," as the Mutiny Act prescribes. The former implies an "incapacity for future service." Hough (1825), pp. 124 and 347.

<sup>2</sup> Vol. I. Ad. Op. 232; Vol. II. *ib.* 175. Where a Summary Punishment was added to the Sentence—*i. e.*, for misbehaviour before the Court—the whole sentence was illegal. Chap. IX. par. 39, note.

<sup>3</sup> If their "Finding" was against manifest evidence, or their sentence for fourteen instead of seven years' transportation, the Commanding Officer could ask for their revision. *Rex v. Kenworthy*, 1 B. and Cr. 711; *Rex v. Ellis*, 5 B. and Cr. 395.

<sup>4</sup> Where a "Record" came up with erasures and interlineations on essential matters, the Judge Advocate General (Grant) advised that the Court should be assembled to make a correct transcript of their minutes (sending up the original "Record" annexed), and this procedure would not amount to "Revision" under the Mutiny Act. 5th Feb. 1831.

<sup>5</sup> Benét, p. 170.

The revision is really an amendment of the Record upon suggestion by the Supreme Legal Authority of the Court.<sup>1</sup>

12. Whenever, therefore, the Record is satisfactory to the Confirming Officer, his duty is, in his own handwriting,<sup>2</sup> to "confirm" the Finding and Sentence, or such one or more or part of either as he deems to be legal<sup>3</sup> and just, (which he "approves" not being material to the validity of Sentence or Punishment of the Prisoner), and, secondly, give directions for carrying the latter into execution. Confirmation is therefore equivalent to Final Judgment upon proceedings otherwise interlocutory, and which thus become estoppel against the prisoner.

13. Before dealing with the Execution, something remains to be written upon the "Sentence;" for the Crown may directly (or indirectly through the General) take one of three courses: 1st. Pardon the Offender, or, 2nd. Mitigate the Punishment, or 3rd. Carry the full Sentence into effect—subjects that will be taken into consideration in the order in which they thus presented.

14. But, as preliminary thereto, it must be noticed that the Sentence of a Court-martial involves no "forfeiture" of Rights in like manner as Conviction or Attainder by a Common Law Tribunal for felony or treason would formerly have involved. The Court of the Constable or Marshal wrought no such forfeiture or corruption of blood according to Lord Coke's authority;<sup>4</sup> for neither were the offences chargeable against the Prisoner cognizable at Common Law, nor was his trial according to the course of it by Indictment and Verdict of twelve Jurors. Where, therefore, an Offender had been convicted of a Common Law Offence by a Court-martial exercising Civil Jurisdiction,

<sup>1</sup> This error may arise from insufficient punishment—at least General Courts often suggest revision with the view that the Court should inflict higher punishment. See a pencil note of the Duke of Wellington on Court-martial Record of Belgium, 14th June 1815, Vol. xiv. Supp. Desp. 558, and Lord Hailes' minute in 1820 (Hough, 1825), p. 100.

<sup>2</sup> *Nash v. the Queen*, 4 B. and S. 943; *the Queen v. Guthrie*, 1 L. R. (C. C.) 111; *Hutton v. Blaine*, *ante*.

<sup>3</sup> 1 Inst. 13a and 391a; 1 Inst. p. 125.

<sup>4</sup> Vol. i. Hale, P. C. cap. 27, p. 354; and 2 Haw. P. C. p. 11.

abroad, it was held that no forfeiture (other than any which the Mutiny Act might inflict) was entailed upon him.<sup>1</sup>

15. I. The Pardon to a Military Offender is not given with the same form or solemn authentication as in Civil cases. If the Crown should think fit (at the instance of the Commander-in-Chief<sup>2</sup>) to pardon and to restore such a Person to his Military Status or Pay, it would be competently done by Royal Sign-Manual Warrant or by a notification in the 'London Gazette,' or if need be by recommissioning or reinstating him.<sup>3</sup> Pardon, however, does not, *ipso facto*, restore the Offender to Office or Pay,<sup>4</sup> or indeed to Her Majesty's Service, if dismissed therefrom—but only remits the Punishment and consequences of the Sentence, with a claim more or less just, to be restored to Rank or Pay.<sup>5</sup> Should the Pardon have been granted to remit the consequences of a Judgment, which as unjust or erroneous never should have been passed,<sup>6</sup> then, the Prisoner meriting a Pardon,<sup>7</sup> should also be restored to his place and pay.<sup>8</sup>

16. II. The mitigation (other than by simple remission of a part) of the Punishment, must be done under Statutory Authority.<sup>9</sup> George I., as already mentioned, was in the practice of remitting "Capital," and of substituting "Corporal" Punishment, but he was advised "that all Judgments that can legally be executed must be the Judgments of the Courts-martial," and that although "he might reprieve or pardon the offender by remitting the whole or any part of the Judgment, yet that he could not change the Sentence of Death into any other Corporal Punishment, because though a mitigation in favour of the

<sup>1</sup> Bk. E, p. 481; G, p. 40.

<sup>2</sup> Bk. F, p. 283.

<sup>3</sup> The Duke of Wellington repeatedly pardoned offenders in consequence of the gallantry displayed in action by their Regiment. G. O. 30th Sept. 1810; 27th July 1811; 22nd Jan. 1812; 30th Jan. 1813.

<sup>4</sup> In America the Sentence of Suspension does not deprive of Pay and Emoluments. 1853. Cushing. Vol. vi. Attorney-General's Opinions, p. 203.

<sup>5</sup> 2 Haw. P. C. Bk. 2, c. 57, sec. 54; G, p. 312.

<sup>6</sup> 2 H. P. C. Bk. 2, c. 59, sec. 18. <sup>7</sup> Case of Parsons, 6 Co. Rep. 11a.

<sup>8</sup> Macey's Case, April 1832.

<sup>9</sup> As to this in the Navy, see Chap. III. par. 15.

Prisoner, yet it was a new and different Judgment which the law did not admit of.”<sup>1</sup> Hence a power of substituting one for another Punishment was inserted, and is found in the Mutiny Act.<sup>2</sup>

17. But though this power was given in a section drawn by Lord Hardwicke, he appears to have been strongly opposed to its expediency. In his view “the change<sup>3</sup> would be attended rather with inconvenience than advantage to His Majesty’s Service.” It would, he feared, “make Courts-martial less careful and circumspect in their Judgments when they knew there was an opportunity to change the Punishment in the nature of an appeal from their Sentence.” “This might prove mischievous, since it was impossible that His Majesty should have the same degree of evidence before him as they who examined the Witnesses *vivâ voce* in open court.” “The Court itself was not confined to give Judgment of death in all cases but Death or such other Punishment as it shall inflict.” Surely therefore, “it will seem a little odd that where the Court, who had all the Witnesses and proofs before them, and had power to give Judgment of death, or for a lesser punishment, at the election, have upon the whole matter given Judgment of death there should be another resort, not for mercy only (which is a proper power, essential and appropriate to the Royal Person) but for a new Judgment, without any opportunity of examining or hearing the same evidence.” These words, though written one hundred and fifty years since, contain counsel not unworthy of the attention of those who have to exercise a power of which Lord Hardwicke thus deprecated the use.

18. III. The Sentence of Death awarded by a Military Court can only be put in execution with the express sanction of the Crown here or of the Civil Governor in a Colony,<sup>4</sup> and in strict accordance with the Law. It “must be pursuant of and warranted by the Judgment: otherwise,” wrote Hawkins,<sup>5</sup> “

<sup>1</sup> Lords Hardwicke and Talbot, Vol. I. p. 510.

<sup>2</sup> Secs. 16, 20, 21 and 25.

<sup>3</sup> Vol. I. pp. 513, 514.

<sup>4</sup> As to a Naval Court, Chap. III. par. 14.

<sup>5</sup> Art. 123 of 1872.

<sup>6</sup> Bk. I. c. 10, sec. 10. The N. D. Act, Secs. 52 and 53, prescribes the method of punishment.

is without authority, and consequently if the Sheriff behead a man where it is no part of the Sentence to cut off the head, he is guilty of felony." The Law of England never fails to protect any one; for the life, limb, and liberty of the Criminal, and even his corpse after death,<sup>1</sup> so far as he is entitled thereto, are as much within the care of the Law as those of the innocent.

19. The place of imprisonment is fixed by proper authority under the 139th Article of War, and must be such as the Law justifies. The removal of the Criminal whence he ought, to another part in the same prison where he ought not to be confined, may be an act of trespass against him. "There is no doubt," said the late Baron Alderson, "that if a gaoler chooses by force or threats of force to compel a Prisoner to move from one part of a prison to another (not the proper place of custody), that is properly the subject of an action of trespass, just as much as the putting an additional fetter upon the Prisoner, which by Law he is not entitled to do."<sup>2</sup> In Allen's case, his removal from the Fort of Agra (where his life would have been sacrificed) to England, was the occasion of his immediate release, though the Sentence was imprisonment for Manslaughter,<sup>3</sup> justly imposed for a crime charged against him as Murder.

20. Imprisonment<sup>4</sup> is "custodia, non pœna;" therefore, under that Sentence compulsory hard labour could not be inflicted,<sup>5</sup> nor could the Prisoner be subjected to the punishment of solitary confinement unless sentenced to it.<sup>6</sup> Penal Servitude is now used in lieu of the punishment of Transportation,<sup>7</sup> and bears the severest form of imprisonment which the Law sanctions. But as these punishments differ little, if at all, from those of the same nature or character which are inflicted by Civil Tribunals, I should be passing beyond the scope of this Work, if I entered upon them, as matters peculiar to the Administration of Justice by Courts-martial. The Mutiny Act

<sup>1</sup> Thus the twelve Judges (to whom the question was referred), advised that the Crown had no power to carry out the sentence of hanging a dead body in chains. Vol. I. Ad. Op. p. 496 (3rd August 1797).

<sup>2</sup> *Cobbett v. Grey*, 4 Exch. Cas. p. 743.

<sup>3</sup> 3 Ell. and Ell. p. 339.

<sup>4</sup> Com. Dig. Imprisonment (Z).

<sup>5</sup> 28 & 29 Vic. c. 126, sec. 19; *Queen v. Baker*, 7 Adol. and Ell. p. 517.

<sup>6</sup> 7 Will. IV. & 1 Vic. c. 90, sec. 5.

<sup>7</sup> *Bullock v. Danks*, 2 B. and Ald. p. 260; 20 & 21 Vic. c. 3.

gives a discretion as to the selection of Prisons, which is generally exercised by sending those who are to rejoin the Service to Military<sup>1</sup> and others to Civil Prisons. Where censure is conveyed by the Sentence as punishment it may be increased by the Confirming Officer ordering the sentence to be read at the head of every Regiment in the Command.<sup>2</sup>

21. It has been already noticed<sup>3</sup> that the Court has the seizure of the whole case, and that the conduct of all the parties appearing before them in the controversy is subject to such strictures as they may see fit to make. Those members of the Service whose conduct has been thus unfavourably adverted to, may be dealt with, under the disciplinary powers of the Crown, by reprimand, removal from the Service, or by substantive proceedings being instituted against them.

22. And as the Court may animadvert upon others, so may their misconduct be brought under the direct notice of the Crown by the Confirming Officer. Thus, in the case of acquittal, where the Court refused to take the measures suggested by the Duke for the revision of their Sentence, he refused his confirmation, and sent their Proceedings home to the Commander-in-Chief for censure. "The decision of the Court seems so unaccountable and so little calculated to enforce the Rules of this Army and General Rules of the Service, which were the evident objects of this trial, that he has determined to bring the conduct of the members under the Commander-in-Chief's notice by the transmission of the Proceedings to England, with his observations with reference to them."<sup>4</sup>

23. Responsibility for the discipline of the Army rests not with the Officers who are the members of Courts-martial (an assumption of self-government which would render the Army supreme), but with the Crown and the General Officer appointed by the Crown to command it. Hence the Duke of Wellington in the Peninsula, and Sir Charles Napier in India,<sup>5</sup> refused to accept these decisions or recommendations to uphold

<sup>1</sup> As to these, see Vol. I. p. 405.

<sup>2</sup> *Oliver v. Bentinck*, 3 Taunt. Rep. 459.

<sup>3</sup> Chap. VIII. par. 61, *ante*.

<sup>4</sup> Vol. vii. Gur. Desp., pp. 197-180; Vol. viii. pp. 53, 306.

<sup>5</sup> Pp. 35, 111.

the discipline and efficiency of the Army; it was easy for them to see how both might be sacrificed by Subordinate Officers.<sup>1</sup>

24. The Judge Advocate General<sup>2</sup> is not the ultimate and supreme Authority in the Army to whom each Military Convict may appeal for Justice<sup>3</sup> against those Superior Officers who have arraigned, tried, and approved his sentence, but he remains as heretofore the ultimate custodian<sup>4</sup> of the Records of General and District Courts to furnish office copies to those entitled to demand them, at a reasonable price.<sup>5</sup> The right to these copies was first given by the Mutiny Act of 1748,<sup>6</sup> "to any person tried by the same, at any time not sooner than three nor later than twelve months after the Sentence given, and whether such Sentence be approved or not." To carry this into effect, a direction was inserted in the Mutiny Act of 1750,<sup>7</sup> that every Acting Judge Advocate should send up the Proceedings with as much expedition as possible to the Judge Advocate General in London, to be kept and preserved in his office, to the end that the persons entitled thereto might obtain copies thereof, as provided for by the Act. In 1860 these provisions were transferred from the Mutiny Act to the Articles of War, where they now stand.<sup>8</sup> The Records of Regimental Courts are kept at the Regiment.

25. No doubt, if, for the purposes of Public Justice, production of these Records were needed, they would be produced under *Subpoena duces tecum* served on the Judge Advocate General, and in cases coming before the Courts he has testified by Affidavit of their contents. This is the view taken of this obligation in America, and there acted upon.<sup>9</sup>

As to the (a) European and (b) Native Armies in India.

26. (a) In this and the two preceding Chapters no particular reference has been made to the Administration of Justice by

<sup>1</sup> C. M. Rep. 1869, Quest. 2747.

<sup>2</sup> C. M. Rep. Quest. 217-18.

<sup>3</sup> Against this view see the evidence of Mr. V. Lushington, Q. C. 2680, 1-4.

<sup>4</sup> *Re Mansergh*, 1 B. and S. p. 406.

<sup>5</sup> As to the Navy, see Chap. III. par. 13 and N. D. A. Sec. 69.

<sup>6</sup> 22 Geo. II. c. 5, sec. 9.

<sup>7</sup> 24 Geo. II. c. 6, sec. 8.

<sup>8</sup> Arts. 157 and 158 of 1872.

<sup>9</sup> Production of Record in aid of Public Justice. 1865. Speed, Vol. ii. Attorney-General's Opinions, p. 143. In Parliament, see Vol. I. p. 175, and Vol. II. p. 329.



Courts-martial in India, thinking it better to reserve the whole subject for separate consideration at the close of this Chapter. I now, therefore, enter upon it (though briefly) with this preliminary remark, that, from the circumstance of the Indian Empire having been originally governed by the Company holding delegated authority from the Crown, a separate Military Establishment, as pertaining to India, has been there created. When, therefore, 'The Government of India Act' passed in 1858, the Crown found established at Fort William and Bengal a Commander-in-Chief for India, with powers over the whole Indian Army analogous to those held by the Commander-in-Chief here over the Home Army,<sup>1</sup> and at the two other presidencies of Fort St. George (Madras) and Bombay, Generals holding commands (subordinate to such Commander-in-Chief) over the troops in those Presidencies. As incident to this Military Establishment, there was the office of Judge Advocate General in each Presidency, and upon the Staff of each General an Officer serving as Adjutant-General for the discipline of the Army, or of that part of it under his Command.

27. The Powers of the Crown were in the Governor-General and Council at Fort William—the Generals, both in Chief Command and in the two Presidencies, were to obey the orders and directions of the Governor-General; but they were appointed and liable to be recalled by the Court of the Company in England.<sup>2</sup> The Act of 1858 only transferred the powers of the Company to the Crown, but left the Military Establishments of India intact.

28. To each of these Generals a Royal Sign-Manual Warrant is issued annually, for convening Courts-martial under the Mutiny Act. The powers common to each are as follows:—

1. To convene Courts-martial for the trial of any Officer or Soldier under the Command. 2. To confirm and then to carry out, or to suspend or mitigate the Sentence. 3. To appoint any Field Officer under the Command to convene and confirm Courts-martial, or to refer the same for confirmation. 4. To appoint Courts-martial for the trial of crimes under the 101st Section and to confirm and carry out the Sentence of the Court. 5. To appoint an Acting Judge Advocate at any Court-martial.

<sup>1</sup> Chap. IV. pars. 14, 15; and Chap. VIII. pars. 2-5.

<sup>2</sup> 53 Geo. III. c. 155, sec. 80.

29. The Warrants differ from each other in these respects:—

1. As to the General of the Presidency,—That, in case an Officer has been sentenced to death, penal servitude, or dismissal, he *must*—or in any other case he *may*—refer the Proceedings to the decision of the Commander-in-Chief in India.

2. As to the Commander-in-Chief in India,—he may Exercise the powers of Confirming Officer in the cases (before mentioned) sent to him from the General of the Presidency, or Transmit these or any other Proceedings of a General Court-martial to the Judge Advocate General in London, for confirmation by the Sovereign. The Commander-in-Chief or the General in Command of a Presidency can order a Sentence of Death<sup>1</sup> to be carried out without the sanction of the Governor-General, if given under the 123rd Article of War, but not if passed under the 101st Section of the Mutiny Act.

30. (b) "The Articles of War for the Government of Her Majesty's Native Indian Forces" are framed<sup>2</sup> upon the basis of the Imperial Code. The several Courts are convened by the same authority (being much the same as our own), except the "Summary Court" which "the European Commissioned Officer in actual command of any Regiment or Corps" may "where immediate example is necessary," hold on his own authority,<sup>3</sup> he alone "constituting the Court."<sup>4</sup> The Ordinary Courts, though usually constituted of *Native*, may, if authorized<sup>5</sup> by the Governor (General, or of the Presidency) or demanded by the Prisoner, be composed of *European* Officers;<sup>6</sup> but in all respects they are governed by the Native Articles. The powers of the "Summary Court" are guarded by limitations laid down in the Articles, and the trial is to be attended by two other (European or Native) Commissioned Officers. The Officer holding the Trial takes the usual oath to administer Justice,<sup>7</sup> but the Record of the proceedings is signed by three Officers.<sup>8</sup> The Trial may be "set aside for reasons based upon the merits,

<sup>1</sup> Sir Charles Yorke's Evidence before Indian Army Commissioners, 1859—Question 6696, and Sir James Macdonald's evidence, Vol. II. p. 354.

<sup>2</sup> Act No. 5 of 1869, "To consolidate and amend," &c.

<sup>3</sup> Art. 90.

<sup>4</sup> Art. 91.

<sup>5</sup> Art. 96.

<sup>6</sup> Art. 97.

<sup>7</sup> Art. 127. The Indian Evidence Act, 1872, would clearly apply to these Courts.

<sup>8</sup> Art. 129.

but not on technical grounds;" though meanwhile the Sentence may be carried into effect on the Commanding Officer's own authority. The Governor-General in Council may make rules (consistent with these Articles of War) for the guidance of Officers, which (upon publication in the Gazette of India) are to have the force of law.<sup>1</sup>

31. The discipline of the Army in India is therefore usually carried out under the authority of the Governor-General and of the General Officers in subordination to him. As to the European Army, the Queen's Regulations remain in force and such General Orders as are promulgated by the Commander-in-Chief at home for the whole Army,<sup>2</sup> are re-issued in India by the General of the Presidency. As to both armies the aid of the Judge Advocate General's Department is at the disposal of the Military Authorities; and in other respects, the method of proceeding is that which has been indicated in the previous portion of this Work.

32. Some other provisions of the Statute Law relating to the European Army remain to be noticed. The 99th<sup>3</sup> Section (Mutiny Act) relates to the recovery of civil debts from the Officers while located in India. It originated in the Indian Mutiny Act of 1823,<sup>4</sup> and was limited to those borne on the Indian Establishment until it was transferred, in 1863, to the Army Act. The other Section (the 101st) originated in the Indian Act of 1840,<sup>5</sup> and was placed in the Army Article of War of 1841,<sup>6</sup> until transferred in 1864 to the Army Act. Special enactments have been passed with reference to the collection and distribution of the Estates and Effects of Officers and Soldiers dying in India, which are contained in the Regimental Debts Act and Regulations printed in the Appendix.<sup>7</sup>

<sup>1</sup> Part III. (j)

<sup>2</sup> A volume published "By Authority" (as the title-page states) was put forth in 1867 by Mr. "George E. Cochrane, late Assistant Military Secretary, India Office," with the title "Regulations applicable to the European Officers in India. It is, in fact, a valuable collection of miscellaneous information usefully collected for reference. See 202 H. D. (3), p. 99.

<sup>3</sup> Chap. VII. par. 42.

<sup>4</sup> 4 Geo. IV. c. 8, s. 57; 20 & 21 Vic. c. 66, s. 67.

<sup>5</sup> 3 & 4 Vic. c. 57, s. 2.

<sup>6</sup> A. 102.

<sup>7</sup> J. secs. 9 and 10; Regs. 11-24.

## CHAPTER XI.

MARTIAL LAW.<sup>1</sup>

1. FROM what has been already written, it will be seen that during the reign of Charles I. certain Royal Commissions were issued, authorizing the execution of Soldiers and citizens under a system of Judicature wholly unknown to the Common Law;<sup>2</sup> that Parliament, by the Petition of Right,<sup>3</sup> and the Judges by their advice in Council,<sup>4</sup> declared these Commissions to be illegal (other than in time of war, when the maxim "*inter arma silent leges*," from necessity, prevails), and that no similar Commission has since been issued by the Crown (other than by William III. to suppress the Rebellion in Ireland<sup>5</sup>); that during the reigns of Anne and George, the Mutiny Act was so amended in its Preamble as to leave the Crown<sup>6</sup> with such powers as it then had for the proclamation of Martial Law, either in time of war or in any place without the Realm; that the Articles of War have, since the reign of James II., authorized the destruction of property (of Rebels) by order of the Commander-in-Chief,<sup>7</sup> and that their operation, though limited within, is unlimited without the area of the United Kingdom or the British Isles as to the punishment of life or limb therein imposed.<sup>8</sup>

<sup>1</sup> On Military usurpation under the sanction of Legislation, see Mr. Dudley Field's argument in M'Cardle's case, Forsyth's Cases, pp. 491-550.

<sup>2</sup> Chap. I. par. 7, *ante*.

<sup>3</sup> *Ib.* par. 9.

<sup>4</sup> *Ib.* par. 12.

<sup>5</sup> *Ib.* par. 13. The Bill of Rights (1 W. & M., Sess. 2, c. 2) declared the Commission for erecting the late Court of Commissioners for Ecclesiastical Causes, "and all other Commissions and Courts of the like nature, illegal and pernicious."

<sup>6</sup> Chap. II. par. 10.

<sup>7</sup> Chap. IV. par. 9; Chap. I. par. 37. As to the exercise of these powers see decisions of the American Courts. *Holmes v. Sheridan*, 1 Dill. 351; *Sellard v. Zuma*, 5 Bush (Ky.) 90.

<sup>8</sup> Chap. II. par. 26.

2. These are but slender grounds upon which to base the doctrine that the Crown has at the present time the power to issue Commissions identical with those put forth by Charles I. for the execution of Martial Law against any who as subjects are entitled to the protection of British Law. However, be this as it may, the materials for forming a correct decision upon a question so important are to be found rather elsewhere than here, the history of the use of troops in aid of<sup>1</sup> or to restore<sup>2</sup> the Civil Power in Great Britain and Ireland, and in all our Colonial Possessions,<sup>3</sup> during the last and present centuries being given in another Work from the official documents extant in the War or Council Office.

3. That much confusion is still existent upon the subject is not to be wondered at.<sup>4</sup> Indeed the action of Parliament and of the Crown, if such a suggestion may be made without offence, in some way contributes thereto. Year after year for many that have passed, an annual Vote has been sanctioned by Parliament for the "Administration" not of Military but "of Martial Law,"<sup>5</sup> and each succeeding Government has appointed, under patent from the Crown, a "Judge Martial" paid out of this Vote, who wholly disclaims having any other knowledge of "Martial Law" than such as every educated gentleman may possess, or anything whatever to do with any other than "Military Law."<sup>6</sup> "It is necessary," said Sir D. Dundas, as Judge Advocate General, in 1850, "to distinguish between Military and Martial Law. 'Military Law' is to be found in the Mutiny Act and Articles of War. Those, and those alone, it is which are properly called the Military Code, and by which the Land Forces of Her Majesty are regulated. 'Martial Law' is not a written law: it arises on a necessity, to be judged of by the Executive, and ceases the instant it can possibly be allowed to cease. 'Military Law' has to do *only* with the Land Forces mentioned in the 2nd Section of the Mutiny

<sup>1</sup> Vol. II. Chap. xvii.; see App. I. *post*.

<sup>2</sup> *Ib.* Chap. xviii.

<sup>3</sup> Vol. I. Note II, pp. 481-511.

<sup>4</sup> Chap. I. par. 7, *ante*.

<sup>5</sup> In the Army Estimates, till 1873, when Mr. Cardwell altered the word to Military.

<sup>6</sup> Evidence of Sir D. Dundas before Army Consolidation Commissioners, quoted Vol. II. p. 360, note <sup>5</sup>; and Lord Loughborough's judgment in *Grant v. Gould*.

Act. 'Martial Law' comprises *all* persons, whether Civil or Military." It is clear, therefore, if anything be so, that Martial and Military Law are not the same, though out of this confusion of thought innocent lives may hereafter be, if already they have not been sacrificed, by an indefinite and undefined responsibility resulting from it.

4. Whether Martial Law may be declared by the Crown, and under what given circumstances, is not a subject to be discussed here; for the Military Officer carrying out the orders of the Crown to supersede all Law by his own authority should not be involved, but should be absolutely free from *all* responsibility in their initiation. Given a Proclamation of Martial Law, issued by the Crown under the advice of Responsible Ministers, his duty should be to carry the same into effect firmly, fearlessly, and, above all things, justly; being sure that, do as he may, he never will escape censure: if he causes death, some may charge him with manslaughter; or should he refrain from so doing, then others will blame him for neglect. The position is one of great responsibility, and therefore to hit the precise line of duty in such cases is most difficult.<sup>1</sup>

5. Now Martial Law, when Lord Hale wrote his 'History of the Common Law,' was not inaptly described by him as "no Law, but something indulged rather than allowed as a Law." It is in effect a rule for superseding the ordinary Law which necessity more or less urgent must be shewn to justify. Of course it has always been lawful for the Officers of the Crown "to repel force with force,"<sup>2</sup> but where, in the anticipation of this extremity, and to prevent before its commencement the greater evil of a violent outbreak, force is initiated by the Officers of the Crown, there the plea of justification originates.

6. For the practical purposes of this Work, Martial Law must

<sup>1</sup> Mr. Justice Littledale's summing up in *Rex v. Pinney*, 5 Car. and Pay. p. 270. An illustration of its truth may be found in the events following on the Jamaica outbreak in 1865. One section of the inhabitants presented a sword of honour to the Commanding Officer (Colonel Nelson), and the other section indicted him for manslaughter.

<sup>2</sup> See Lord Hardwicke's Report of 1732, and other Papers, Vol. II. p. 623; and App. J. *post*, as to troops suppressing riots.

be considered separately in each branch of the subject; that is, as applicable

1. To Officers and Soldiers under the Military Code.
2. To the whole community, Civil and Military.

And this fact must also be borne in mind,—that to whomsoever this Law may be applied, it is the same, although the justification for its use may rest upon widely different considerations.

#### I. As to Officers and Soldiers under the Military Code.

7. "If," said Sir D. Dundas, "five or six Regiments were to mutiny in the field, would any one tell me you must apply to Parliament before you could reduce those persons to subjection? There must be somewhere, for public safety, a right to exercise such power in time of need. Such a case has happened in our own time. The Officer in command did that which a Soldier in command is bound to do: viz., he took measures for the purpose of suppressing such, and was prepared to put such persons to death if necessary."<sup>1</sup> The firing of an armed Sentry upon a Prisoner of War,<sup>2</sup> or one for whose safe custody he is responsible with his own life, must be justified (if at all) on the same ground of necessity.<sup>3</sup>

8. But this summary method of restraint or punishment has been put in execution to suppress ordinary crime of a less urgent nature where public policy or example needed it. Thus, when the Army was in Holland, in 1794, and Soldiers had committed a robbery and attempted the murder of a woman and child, the Duke of York "did not hesitate for a moment to order

<sup>1</sup> Quoted Vol. II. p. 160, note <sup>2</sup>, and Lord Loughborough in *General Wall's Case*, *ib.* p. 159.

<sup>2</sup> As to the execution of Prisoners of War breaking their parole, see App. K.

<sup>3</sup> The case of Thomas Lord Camelford, Commander of the 'Favourite' Sloop of War, may be referred to. He shot down Lieutenant Peterson of the Ship 'Perdrix,' on the 13th of January, "for very extraordinary and manifest disobedience to his lawful orders, and for arming the Ship's Company to resist the same." He was honourably acquitted of "Murder" by a Naval Court on the 20th January, 1798. A Naval Court, on the 27th September 1775, gave a similar acquittal to an officer for shooting down (like a good Officer) one of four sailors leaving the Ship as Deserters. See Vol. II. M'Ar. pp. 442 and 430. See Vol. II. p. 275, and Vol. II. Ad. Op. p. 245.

the Provost Marshal to proceed to the scene of the outrage, and by the instant execution of the offenders to put a stop to such conduct."<sup>1</sup> The supposed want of this power in the Peninsula was pressed upon the attention of the Cabinet by the Duke of Wellington in 1809.<sup>2</sup> "By the custom of British Armies," he wrote, "the Provost has been in the habit of punishing on the spot (even with death under the orders of the Commander-in-Chief) Soldiers found in the act of disobedience to orders, or of outrage. There is no authority for this practice except custom, which I conceive would hardly warrant it,<sup>3</sup> and yet I declare that I know not in what manner this Army is to be commanded at all, unless the practice is not only continued, but an additional number of Provosts appointed."

9. The deliberations of the Law Officers on this question raised by him were thus made known to the Duke. "So far as I can recollect any principle," wrote Lord Castlereagh, "summary punishment seems to be most clearly justifiable when inflicted *instantly* on the commission of the offence, and when the proofs are of a nature to place the guilt of the party beyond *all* doubt. Where time has intervened and the offenders have been committed to custody, when the guilt is to be collected from the evidence rather than from the view, there the intervention of a Court-martial seems the preferable course. I have not found any one who doubted that it would be clearly competent for the General Commanding to punish with death upon his own view of the guilt; but whether he can delegate such a power to his Provost Marshal seems more questionable."

10. The Duke did not, however, flinch from carrying out summary execution upon Soldiers for breach of the Civil Law. In October 1810, he announced, by General Order, that he was "concerned to have been under the necessity of carrying into execution the determination which he has so long announced of directing the immediate execution of any Soldiers caught plundering, and that a British and Portuguese Soldier have consequently been hanged this day for plundering in the town of Leiria, where they were contrary to order, and for this

<sup>1</sup> Letter quoted, Vol. II. p. 665.

<sup>2</sup> *Ib.* p. 663.

<sup>3</sup> See Vol. vi. *Gur. Desp.* pp. 517-518.



criminal purpose. He trusts this example will deter others from those disgraceful practices in future, and the troops may depend upon it that no instance of the kind will be passed over."<sup>1</sup> For the suppression of crime he laid down the duties of the Provost Marshal and his Assistants by General Order of November 1811,<sup>2</sup> making the Provost responsible for the custody of Prisoners, the preservation of good order and discipline, by his presence in those places in which breaches of either are likely to be committed, and by punishing those found in the act of committing breaches of order and discipline. His summary power of punishment was limited to his own view of the crime. His assistants, who were not Commissioned Officers, were to exercise these summary powers only when the crimes needed such punishment for the sake of example; but they had no power to inflict Capital Punishment,<sup>3</sup> even though they caught the Soldier in the act of committing an outrage. The Provost was to execute his own duty on his own responsibility, it being clearly understood that no Officer whatever had a right to order him or his assistants to exercise his authority.<sup>4</sup>

11. To relieve the Commanding Officers and the Provost Marshal from responsibility in these summary punishments,<sup>5</sup> the Government submitted a Bill to Parliament in 1813, which (when passed as the 53rd Geo. III. c. 99) authorized the assembly of General Detachment Courts for the trial of Military offenders guilty of Civil offences against the inhabitants of the country, but no other amendment in the Law was made during the Peninsular War. The Provost Establishment of the Duke, and the powers which these Officers exercised, rested, therefore, solely upon the Prerogative of the Crown and the customs and usages of the Service as then understood in the Army.

12. Although summary powers of Martial Law were exercised

<sup>1</sup> Vol. iv. Gur. Desp. p. 311, and General Orders of 3rd October 1810, and 10 June 1812, Vol. v. p. 704.

<sup>2</sup> Vol. v. p. 347, and where an Assistant-Provost was to be appointed to punish Stragglers, Vol. II. Supp. Desp. 152; and again where the Provost was sent with powers to exercise Martial Law by hanging, *ib.* 247, 322. See Warrants for Capital Punishment for Plunder, signed by the Adjutant-General, *ib.* 318-320; Ch. VIII. par. 3, *ante*.

<sup>3</sup> Vol. vi. pp. 517-518; and see Court-martial trial for punishing without a personal view, Vol. xiii. Supp. Desp. p. 685, 14 *ib.* p. 8.

<sup>4</sup> Vol. xiv. Supp. Desp. 500.

<sup>5</sup> 41 H. D. (3), p. 1271.

by the Duke of Wellington throughout the Peninsular War, without Parliamentary sanction, it was expedient that, at the close of it, Parliament should give some definite recognition to this system of governing an Army abroad in time of war; therefore, when the late Lord Hardinge became Secretary at War in 1829, and the Military Code was recast, additional powers were given to the General in Command: 1st, by the Mutiny Act authorizing the assembly of Drumhead Courts-martial<sup>1</sup> on the line of march, which appear to have been previously used<sup>2</sup> in the Army; and 2ndly, by the Crown issuing an Article of War (now the 164th), framed on the model of the General Order of November 1811, giving definite but enlarged powers to the Provost Marshal, to be appointed by the General Officer or the Crown, for the repression of disorders by summary punishment. These powers, and especially the latter, came under discussion in the House of Commons in 1838, and their expediency was unimpeached.<sup>3</sup>

### 13. II. As to the whole community (Civil and Military).

Under what circumstances Martial Law may be resorted to is not a problem to be decided in anticipation of the event. This was very clearly explained by Lord Castlereagh to the Duke, in the correspondence already adverted to.<sup>4</sup> Admitting the power of summary punishment, even of death, to reside in the Commanding Officer of an Army in the field, "in what precise mode or under what particular circumstances such power is to be exercised could not be determined. The necessity of the case could only be the rule, and the power must be regulated by the conscientious sense of duty and of responsibility." "To be effectual, it must be both *summary* and arbitrary; and therefore, under the British Constitution, it is impossible that such a power should be entrusted *a priori* to any man." This accords with a recent Circular issued from the Colonial Office to the Governors of Colonies on the subject of Martial Law,<sup>5</sup> and may be accepted as the Law at the present time.

### 14. But, assuming the justifying circumstances to exist, and

<sup>1</sup> 11 Geo. IV. c. 7, sec. 10; Vol. II. pp. 177, 665, 666.

<sup>2</sup> General Wall's Case, 28 St. Tri. pp. 71-151. Sir Thomas Picton's Case, 41 H. D. (3), p. 1273.

<sup>3</sup> 41 H. D. (3), p. 1271.

<sup>4</sup> Vol. II. p. 666.

<sup>5</sup> Jan. 1867, printed Vol. II. p. 667.

Martial Law to be proclaimed, it would be an error to suppose that Military Law is thereby (*ex vi termini*) put in immediate operation: for Martial Law is, as we have seen, the annihilation of all other Law (Civil or Military) in respect of the persons upon whom it is to operate.<sup>1</sup> "The union of Legislative, Judicial, and Executive Power in one Person is," as the late Sir Charles Napier<sup>2</sup> aptly expressed it, "the essence of Martial Law," or, as the Duke of Wellington explained to Mr. Stuart (when it was suggested that he should govern Portugal under it), "it is neither more nor less than the will of the General of the Army. He punishes, either with or without trial, for Crimes either declared to be such or not so declared by any existing Law or by his own orders."<sup>3</sup>

15. "It is," said the Duke, on another occasion, "for the authority proclaiming Martial Law distinctly to lay down the rules and regulations, and the limits according to which it is to be carried out."<sup>4</sup> In the absence of any such specific

<sup>1</sup> Ceylon Evidence, quoted Vol. II. p. 160. note <sup>2</sup>.

<sup>2</sup> Vol. ii. p. 426 of his Life.

<sup>3</sup> Vol. iv. Gur. Desp. p. 24.

<sup>4</sup> Vol. II. p. 502. The Government of America, in April 1863, issued instructions for the guidance of their Armies during the War, from which the following extracts are taken:—

*"Martial Law and Military Jurisdiction.*

"1. A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the Martial Law of the invading or occupying Army, whether any proclamation declaring Martial Law, or any public warning to the inhabitants, has been issued or not. Martial Law is the immediate and direct effect and consequence of occupation or conquest.

"The presence of a hostile Army proclaims its Martial Law.

"2. Martial Law does not cease during the hostile occupation, except by special proclamation ordered by the Commander-in-Chief, or by special mention in the Treaty of Peace concluding the War, when the occupation of a place or territory continues beyond the conclusion of Peace as one of the conditions of the same.

"3. Martial Law in a hostile country consists in the suspension by the occupying Military Authority of the Criminal and Civil Law, and of the domestic Administration and Government in the occupied place or territory, and in the substitution of Military rule and force for the same, as well as in the dictation of general laws, as far as Military necessity requires this suspension, substitution, or dictation.

"The Commander of the Forces may proclaim that the administration of all Civil and Penal Law shall continue, either wholly or in part, as in times of Peace, unless otherwise ordered by the Military Authority.

"4. Martial Law is simply Military Authority exercised in accordance with

direction, and as better than no Law whatever, the Military Code would furnish the Officer with some guide to his mode of Judicial Procedure. The Mutiny Act and Articles of War are not, however, *ex proprio vigore*, in force; and when the late Sir H. Smith was administering the Cape Government, he was advised by the Local Law Officers that Martial Law was a

the laws and usages of War. Military oppression is not Martial Law; it is the abuse of the power which that law confers. As Martial Law is exercised by Military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honour, and humanity—virtues adorning a Soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

"5. Martial Law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected, and must be prepared for. Its most complete sway is allowed—even in the Commander's own country—when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.

"To save the country is paramount to all other considerations.

"6. All Civil and Penal Law shall continue to take its usual course in the enemy's places and territories under Martial Law, unless interrupted or stopped by order of the occupying Military power; but all the functions of the hostile Government—legislative, executive, or administrative—whether of a general provincial, or local character, cease under Martial Law, or continue only with the sanction, or, if deemed necessary, the participation of the occupier or invader.

"7. Martial Law extends to property and to persons, whether they are subjects of the enemy or aliens to that Government.

"11. The Law of War does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the War, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of War between the contracting powers.

"12. Whenever feasible, Martial Law is carried out in cases of individual members by Military Courts: but sentences of death shall be executed only with the approval of the Chief Executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the Chief Commander.

"Military Jurisdiction is of two kinds: first, that which is conferred and defined by Statute; second, that which is derived from the Common Law of War. Military offences under the Statute Law must be tried in the manner therein directed, but Military offences, which do not come within the Statute, must be tried and punished under the Common Law of War. The character of the events which exercise these jurisdictions depends upon the local laws of each particular country.

"In the Armies of the United States the first is exercised by Courts-martial, while cases which do not come within the 'Rules and Articles of War,' or the jurisdiction conferred by statute on Courts-martial, are tried by Military Commission."

"thing distinct altogether from the Military Law created by the Mutiny Act and Articles of War," and therefore "that the provisions of the Mutiny Act and Articles of War did not necessarily regulate either the Sentences pronounced by Courts-martial against such Criminals in regard to such Crimes, or the Powers of the Commander-in-Chief in regard to the Commutation of such Sentences."<sup>1</sup> "In my opinion," said Sir D. Dundas before the Ceylon Committee in 1850, "an officer cannot go very wrong who adheres as closely as the circumstances will permit him to the mode of administering the Law under the Mutiny Act; and if he will take the latter part of the oath taken under that Act, it appears to me to afford him a very safe and honest guide in such a critical case."<sup>2</sup>

16. Martial Law may be the rule of Government till a Civil Government can be established in (a) a conquered country (as in Scinde), or till it can be restored in (b) a rebellious one (as in Jamaica): however, controversial questions more usually arise where it is used or applied to the latter case (b) in the suppression of Rebellion, therefore it will be better to confine our consideration to that aspect of the subject in the concluding paragraphs of this Chapter.

17. It is seldom that the initiation of a system of Martial Law for the suppression of Rebellion receives much forethought, and Martial Law may be in operation without any deliberate proclamation from the Executive Government of its existence. In ordinary circumstances, a Riot, which the Peace Officers first endeavour to suppress, precedes it. Then troops are called in to aid the Civil Power, and act for a time at least under the directions of the Magistrates. From necessity or supineness, the latter may either retire or their authority may be completely destroyed, so that the Military Officer alone has to suppress the Riot and restore Peace. Thus a united force of Constables and Soldiers, originally arrayed under the Civil Power, in the course of events passes under the Command of the Military Officer, rightly assuming the responsibility—when the Civil Authorities have shown themselves incapable—of upholding Public Order. Such, in outline, were the facts

<sup>1</sup> Vol. II. p. 307

<sup>2</sup> Quoted Vol. II. p. 163, note.

of the case in 1780, when the followers of Lord George Gordon sought to destroy London.<sup>1</sup> The Military, in acting without the Civil Power, were so far supreme; but this supremacy ceased<sup>2</sup> when the Riots were put down, and the Prisoners were handed over to, and tried by, the Civil Tribunals of the country.

18. Given the necessity for Martial Law, and a Proclamation, though usual as a warning to those thus made subject thereto, is not a condition precedent essential to the legality of that rule.<sup>3</sup> In the absence of any definite instructions, either by Proclamation or otherwise, the Military Officer called on to execute Martial Law would have to depend entirely on his own sense of expediency as to the measures which are necessary for him to adopt in regard to the public safety. In the Canadian Rebellion of December 1837, a Proclamation was issued and a definite Letter of Instructions issued to Sir John Colborne (then in command) to carry the same into effect with a discretion to pardon Offenders;<sup>4</sup> but the Proclamation, as such, gave to the Governor who issued it no authority which he had not before: nor did it justify—except from necessity—any departure from the ordinary rule of Law. “For this reason, *Quod necessitas cogit defendit*,” wrote Lords Campbell and Cranworth (both men who subsequently held the Great Seal), “we are of opinion that the prerogative [of executing Martial Law] does not extend beyond the case of persons taken in open resistance, and with whom, by reason of the suspension of the Ordinary Tribunals, it is impossible to deal according to the regular course of Justice. Where the Courts are open, so that Criminals might be delivered over to them to be dealt with according to Law, there is not, as we conceive, any right in the Crown to adopt any other course of proceeding. Such a power can only be conferred by the Legislature, as was done by the Acts passed in consequence of the Irish Rebellions of 1798 and 1803, and also by the Irish Coercion Act of 1833.”<sup>5</sup>

<sup>1</sup> Vol. II. p. 166, and Letters of 1786 printed at pp. 635 and 636, and Order in Council and to the Adjutant-General, pp. 659-660.      <sup>2</sup> *Ib.* pp. 167-168.

<sup>3</sup> Sir D. Dundas, Ceylon, 1850, Question 5159, and Opinion of Lords Campbell and Cranworth, Vol. II. p. 499. The same remark applies to reading the Riot Act in ordinary Civil Commotions. See Vol. II. pp. 129-132.      <sup>4</sup> Vol. II. p. 499.

<sup>5</sup> As to these, see the facts set out, Vol. II. pp. 168-174, 661, 662.

19. "In time of Peace the exercise of Martial Law in point of death is declared Murder,"<sup>1</sup> wrote Lord Hale, at the close of 1700: nor do his words need qualification in this century. A Military Officer having Prisoners taken in the Riot should hand them over to the Civil Power, if existing; but, if not existing, then his responsibility is to execute *Justice* in the best manner that the circumstances afford him the opportunity of doing, by Civil Tribunals, if they can be convened,<sup>2</sup> or by Courts-martial, if those Courts only can be summoned. "When it is impossible," said the late Sir James Mackintosh<sup>3</sup> "for Courts of Law to sit or to enforce the execution of their Judgments, then it becomes necessary to find some rude substitute for them, and to employ for that purpose the Military, which is the only remaining Force in the Community."

20. Such necessity arising for the trial of Civilians by Courts-martial, the Commanding Officer will be careful to compose those Courts, of Men (Civil or Military) whose experience and character afford to the Criminal the best security for the exercise of a sound judgment and discretion in the most solemn function of Judicial Administration which they as Judges are thus unexpectedly called upon to discharge. The Court should be formed as near to the model of the highest Criminal Court as possible: it should proceed upon charges based on the known Criminal Law, and upon sworn evidence given in the presence of the Accused. What he has to say in his defence should be patiently heard, and a Record—complete so far as circumstances will permit—should be made of all the Proceedings. The analogy of the Military Code is to be followed (as we have seen) not as binding, but as directory; for the Jurisdiction of the Court is to be upheld, not by the authority of the Mutiny Act, but by the supreme power of the Executive Government to administer *Justice* at all times.

21. There is little fear that a British Officer, though he may be empowered to do so, will ever desire to invent either Crimes or Punishments against a Prisoner, but the reader may be reminded that both should usually accord with the known

<sup>1</sup> Pleas of the Crown, Vol. i. p. 500.

<sup>2</sup> Vol. II. pp. 499, 502.

<sup>3</sup> Vol. I. p. 161.

**Criminal Law.** The method of trial cannot aggravate the guilt, nor ought it to increase the just Punishment of the Offender. Where, however, obedience to Military Orders is of vital importance to the Public Security, then disobedience is essentially a Criminal Act.<sup>1</sup>

22. If it should so happen that a part only of a country is under the ban of Martial Law, as was the case in Ceylon<sup>2</sup> in 1848, and in Jamaica<sup>3</sup> in 1865, then, as Crime is Local, care should be taken that the Offender should be arrested<sup>4</sup> and tried, and the Offence should have been committed within the area where Martial Law prevails.

23. Neither can (it is said) a Proclamation of Martial Law have a retrospective operation.<sup>5</sup> If this view be correct, then the offence must have been committed after the Proclamation was issued, and of course must be tried before the same is recalled.

24. The remedy here—as in the other cases of usurped power—is an appeal to the Common Law Tribunals of the

<sup>1</sup> In anticipation of the landing of an enemy in Ireland, the Duke of Wellington wrote thus, in December 1807:—

“The next thing to do is to proclaim Martial Law all over the country; the object of this proclamation will be not to subject the people to Military licentiousness, but to oblige them to obey, and to make it criminal to disobey the orders of the General, or other Superior Officers commanding in the different districts.

“The orders must be:—

“1st. To prevent any man from leaving his house between sunset and sunrise without a pass, except Justices of the Peace and those attending them to enforce the obedience to the orders of the General.

“2nd. To oblige every man to post upon his door the list of the names, and the description of the persons in his house.

“3rd. To make this master responsible that those persons are in his house at night, unless lawfully absent.

“4th. To prevent any number of persons beyond ten from assembling at any time in any place.

“5th. To oblige all persons to give up their arms.

“6th. To force the supply of provisions and transport for the service of the Army.

“7th. To prevent their being supplied to the enemy.

“The Commanding Officers must be held responsible for the conduct of their troops as well in the performance of this part of their duty as of all others.” (Irish Desp. p. 209, and see p. 280.)

<sup>2</sup> Vol. II. p. 501.

<sup>3</sup> *Ib.* p. 492.

<sup>4</sup> *Ib.* p. 495.

<sup>5</sup> See the Opinions of Lord Abinger, Sir N. Tindal, and Lord Lyndhurst, given in the Debate of 1826, quoted Vol. II. p. 189.



Realm, if they should be existent and to the Civil Government if sufficiently restored to enable their orders to be obeyed. In Wolfe Tone's Case, the appeal was not made in vain; and the Judgment of Mr. Justice Davis, delivered in the Supreme Court of the United States during the December term, 1865, in *Re Lambdin P. Milligan*, upheld the supremacy of the Civil Tribunals in all cases where they were open, and in "the unobstructive exercise of their Jurisdiction."<sup>1</sup>

25. Nor is this the only appeal that can be made to those Courts; for there the Military Officer may be arraigned to answer with his life for the oppression or cruelty (if any) with which he may have carried out his extraordinary powers. In earlier cases, where the Crown had received honest service from Officers (Civil or Military) serving either at home or in distant Dependencies, their acts in support of the Crown against a rebellious Community were adopted as those of the State, and a *Nolle prosequi* was entered to protect them against legal prosecution from those whose name may be *Legion*.<sup>2</sup> More recently, a different policy has been initiated.<sup>3</sup> Those charged with wrong in the Civil or Criminal Courts here are to meet the Indictment or Suit upon their own responsibility, either alone, if Governors, or with the aid of a Public Department, if Military Officers;<sup>4</sup> but, anyhow, they must either propitiate their adversaries or take the chance of what a Grand before, or a Petty Jury after, a public trial may determine.

26. How such an accusation is to be met is not at present within our legal experience to detail. An executive Officer, resting his authority upon "Martial Law," must (I presume) be prepared to show that it was declared not only *de facto* but also *de jure*; for otherwise, indeed, any usurpation might be tolerated.<sup>5</sup> That done, his acts must be justified as coming within the limit of his authority, and, therefore, he must transfer by legal

<sup>1</sup> No. 350, Certified Copy of Opinion, p. 9.

<sup>2</sup> Vol. II. pp. 131-136, 615.

<sup>3</sup> Vol. II. p. 177.

<sup>4</sup> Colonel Nelson, in the Jamaica Case, was arrested by a Bow Street Warrant granted under 11 & 12 Vic. c. 42, sec. 2, and 24 & 25 Vic. c. 110, sec. 9. See *Reg. v. Vaughan*, 9 B. and S. p. 340.

<sup>5</sup> Vol. II. pp. 152-155.

evidence all the incidents of Rebellion from, it may be, a distant Colony to the arena of Westminster Hall. Whether all the links in the chain can be completed is the risk upon which his safety depends, unless, indeed (as in a recent case) his fellow-countrymen, who are sworn as a Grand Jury, afford him protection.

## CHAPTER XII.

COURTS OF INQUIRY.<sup>1</sup>

1. IN entering upon this Chapter, it is essential to divide the subject of it into two Sections, and to consider—

1st. Commissions or Courts of Inquiry held by order of the Crown or a Commanding Officer under Prerogative Authority only.

2ndly. Such Courts as are held by the like order, but under Statutory Authority given either by the Mutiny or some other Act, and exercised by Articles of War, or Regulations put forth (under Statute) by the Crown,

treating of these according to the order in which they are thus presented to the reader.

I. As to Courts of Inquiry held without Statutory Authority.

2. In a previous Chapter I have endeavoured to show that after the Mutiny Act had sanctioned the infliction of Capital Punishment by Courts-martial for specific crimes, the same Tribunals continued (as theretofore) to exercise an inferior authority in other matters not embraced in the Act. That, in fact, Courts-martial exercised and were constituted under Statutory, for serious crimes, and under Prerogative Authority, for lesser ones, or for such acts of omission or commission as were scarcely crimes at all. In the progress of Legislation this Prerogative Authority became absorbed, by the provisions of the Mutiny Act being extended to mixed matters of adminis-

<sup>1</sup> As to general authority of these Courts see Chief Baron Kelly's judgment in *Q. of 1* or in *Dawkins v. Rokeby*, S. L. R. (Q. R.) 262-272, and the modifications in the Army, Appx E Sec VII. *post*, and in the Navy, Ad

tration and discipline, but that, as this absorption was gradual, it is not easy to determine in what year or period the practice originated of summoning (1) Courts-martial under the Mutiny Act, to exercise the functions of Courts of Inquiry, or (2) Courts of Inquiry under the Prerogative, to exercise that Jurisdiction.

3. The truth of these remarks will become more apparent in tracing the history of these Courts; for in the earlier period of their use they appear to have been summoned as Courts-martial to examine (as Courts of Inquiry now do) into the truth of allegations, and to report on the matter of fact, with the opinion of the Court thereon, for the assistance of the Sovereign or the General Officer in Command of the Army.<sup>1</sup> In exercising these functions under this authority, the members probably did so with the same efficiency as they would have done had they been sitting as Judges on a Court-martial,—as then, and for many years later, no coercive power was possessed by a Court-martial over any persons to compel either their attendance or their testimony as Witnesses.<sup>2</sup> Therefore these Courts—either Martial or of Inquiry—did not so essentially differ from each other, when, as now, the first rests on Statutory, and the other (save the Courts which will be specially referred to hereafter) on Prerogative Authority only.

4. Neither must the method of governing the Army then in vogue by the confidential Reports of “General Officers”<sup>3</sup> (advising the Crown through the Secretary at War) be overlooked in this question. William III., at an early period of his

<sup>1</sup> This letter to Mr. Byde (as to whose appointment as Judge Advocate, see Vol. II. p. 360, note<sup>2</sup>) is taken casually from the War Office Letter Book (138), p. 168, for illustration :—

“Whitehall, 17th March 1708-9.

“SIR,—By Her Majesty’s direction, I send you the enclos’d Petition of Lieut. Lacklan Mackintosh of y<sup>e</sup> Lord Mark Kerr’s Regt., with his Lordship’s answer; and am to signify to you Her pleasure that you summon a Court Martiall on Saturday morning next to examine the allegations of the said Petition, and to report the matter of fact with their opinion thereupon, that the same may be lay’d before His Grace the Duke of Marlboro’ on Monday morning next.

“I am, Sir,

“Your most humble Servant,

“To Thos. Byde, Esq.”

“R. WALPOLE.

<sup>2</sup> Chap. VIII. par. 47-49 *ante*.

<sup>3</sup> As to these, see Vol. II. pp. 257, 357.

reign, constituted such a Board,<sup>1</sup> and in those of his successors resort was had to this advice by the establishment of a permanent Board of such Officers. When, however, matters needed the special investigation and advice of other experienced Military Officers, a Royal Sign-Manual Warrant was issued (under the countersign of the Secretary at War) to the Judge Advocate General, requiring him to summon those Officers who were named therein, as a Board of Inquiry. The first of these Special Warrants, so far as I can trace, was (not that which is usually cited as such in Sir John Mordaunt's<sup>2</sup> (1757), but) that in Sir John Cope's case (August, 1746), under the countersign of Henry Fox, afterwards Lord Holland.<sup>3</sup>

5. The disasters of Sir John Cope at Prestonpans are probably known to most readers, and to many from the pages of the noble and accomplished historian of the Rebellion of 1745. After the close of it the king "thought proper to direct a Board of General Officers to examine the conduct, behaviour, and proceedings of Sir John Cope and Colonel P. Lascelles, from the time of the breaking out of the Rebellion until the action was over at Preston, near Seaton; and likewise into the conduct, behaviour, and proceedings of General Fowke, from the time he took the command of the two Regiments of Dragoons, then in Edinburgh, until the said action was over, which happened on the 2nd September 1745." He did so, by naming General Wade as President and four Lieutenant-Generals<sup>4</sup> "as a Board," with

<sup>1</sup> Chap. IX. par. 4; and William III.'s Warrant of the 18th February, 1694-5, was addressed to a Board of General Officers (of whom three were to be a quorum) for the redress of grievances in the Army. They were to sit twice a week, or oftener, "at the Great Chamber in our Horse Guards at Whitehall," that complaints might be made. They were also to inquire into the behaviour of the Officers and Soldiers in reference to their payments or any other matters, and to refer such cases to Court-martial as they saw fit, and to report extraordinary cases to the King.

The Board was then required to consider of and make such "Rules and Regulations for the better government of our Forces" as should seem meet for the King's approbation. The concluding paragraph is in these words: "And our Judge Advocate of our forces or his deputy is at all times to give his attendance at such meetings, and to receive and observe the directions of our said officers as the duty of his place may require." \*

<sup>2</sup> Form in Appendix V. of Tytler.

<sup>3</sup> *Mis. Bk.*, pp. 12, 13. <sup>4</sup> Guise, Lord Cadogan, Folliot, Duke of Richmond.

authority to summon "such witnesses as should be able to give testimony touching the conduct, behaviour, and proceedings of the said several Officers," "strictly to examine into the matters, and to report the state thereof as it should appear to them, together with their opinion what is proper to be done thereupon."

6. These instances—that in 1708 and this in 1746—furnish a type of each class of case, for which, first in the "administration" and then in the "government" of the Army, Courts of Inquiry have been used. No doubt, in either the principles of the Common Law are violated; for "Commissions or Courts only to inquire are against Law," because, as stated by Lord Coke,<sup>1</sup> a man may be (1) unjustly accused, and shall be without remedy, or (2) defamed, and not have any traverse of it. The Military Law does not, however, profess to follow the Common Law, or the necessity for it would altogether cease.

(1.) In the Administration of the Army.

7. It may readily be supposed how frequently the necessity must arise for information from a Regiment or Station upon claims put forward against the public;<sup>2</sup> nor less frequently does the same necessity arise out of other ordinary matters of Administration. To satisfy the requirements of the Finance Minister responsible to Parliament for the disbursement of the public treasure, this information is often obtained through the agency of a Court of Inquiry, which at his instance is assembled to examine into the facts, to report upon the circumstances, and, if called upon so to do, to offer their opinion on the nature of the claim, or upon the incidents out of which the same has arisen. In this manner very many matters are adjusted which otherwise would lead either to adverse judicial investigation, if the claim were just and yet ignored, or to fraud, if put forward (with success) to impose upon the public. To cut off the Finance Minister from this aid to his Administration is a

<sup>1</sup> Commission of Inquiry, 12 Coke Rep. p. 31.

<sup>2</sup> Boards for investigating claims for loss of arms, accoutrements on service furnish an illustration. See Vol. II. pp. 115 and G. O. of 15th December 1811.

suggestion scarcely consistent with the official experience of those by whom it has been made.

(2.) In the Government of the Army.

8. Consistently with the public safety, the Army can only be governed by absolute power being vested in the Crown;<sup>1</sup> which, when occasion requires it, must be exercised summarily, and, may be, silently, against the status of Officers and Soldiers. Instant dismissal of individuals, or prompt disbandment of Regiments without cause assigned, is an exercise of power which must be lodged somewhere, and by our Constitution it is confided to the Crown as the supreme power in the State. Out of this may arise—upon occasions felt by a conscientious<sup>2</sup> Minister—the necessity of previous confidential inquiry before this power of annihilation is exercised against those represented as obnoxious to discipline, Civil as well as Military. Or again, as the Criminal Law of the Army can only be put in force against an Inferior by a Superior Officer, cases may arise in which the facts are not so patent, or the source of information so impartial, as to satisfy the latter Officer that justice demands a Court-martial trial upon the accused.

9. In these or any similar cases, whether for the “Administration” or “Government” of the Army, a Court of Inquiry, being summoned, the members, though unsworn to secrecy, discharge according to the rules of Military, a function analogous to that of a Grand Jury in Civil, procedure. No disclosure is made of the Evidence voluntarily adduced, nor are they required to arraign the supposed culprit before them. To throw their proceedings broadcast before the world, for any motive, is to sow dissension, and often to fix a stigma of blame upon one or more Officers who may never have heard of the evil imputed to them. “The true conception of a Court of Inquiry,” said Mr. Windham, “was of persons delegated to inquire into the circumstances of any transaction for the purpose afterwards of advising His Majesty confidentially whether there was ground for submitting the matter to Judicial Inquiry. They were

<sup>1</sup> Vol. II. pp. 40, 118–123, 328.

<sup>2</sup> See Adye's Remarks, p. 73.

advisers, not judges; or if judges, only whether the matter ought to be submitted to judgment. As analogous to a Grand Jury, they ought to keep their proceedings secret; and as a secret tribunal, they were to determine whether they would advise His Majesty to try his Officers." Then, speaking of the open Court of Inquiry upon the Convention of Cintra, of which the Duke (then Sir A. Wellesley) so bitterly complained, he blamed the Ministers for having "conceived and brought forth that monstrous production unknown to our Laws and usages, an open Court of Inquiry—a show of trial without the reality."<sup>1</sup> "A Court of Inquiry," wrote Sir Charles Napier,<sup>2</sup> no mean authority on Military Law, "ought generally to be a closed Court; no one allowed to enter but such individuals as are called for, and who, being privately examined, are sent out. If any person happens to be accused of misconduct, he is called upon for his statement of the matter in hand like any other person: he may either appear or refuse to appear as he pleases,<sup>3</sup> unless ordered by superior authority, and either answer any questions put to him, or refuse to answer. The Court may either communicate to him what has been said, or refuse to communicate what it has elicited; it does what it deems best suited to obtain information on which higher authority can safely act. It is generally objectionable to make a Court of Inquiry an open Court."<sup>4</sup>

10. This is unquestionably the view taken by the Common Law Tribunals of these Courts. As against Officers in the Army their function is admitted;<sup>5</sup> while, on the broad rules of public policy and convenience, matters secret in their nature—involving delicate inquiry and the names of persons—stand

<sup>1</sup> 12 H. D. (O. S.) pp. 939-940.

<sup>2</sup> Umballah, 17th Nov. 1849. Records of his Indian Command (Mawson, Calcutta, 1851), p. 59; no bad book for the perusal of one interested in the view which a Military Magistrate entertained of his duty.

<sup>3</sup> Vol. ii. Ad. Op. p. 162.

<sup>4</sup> The convening authority decides this and other methods of procedure. In *Somerville's Case*, Vol. xxvii. Parl. Pap. p. 443 (1831-2), legal advisers attended a closed Court, and gave written undertakings not to publish the proceedings. The J. A. G. personally attended to conduct his Case, as he did the Chelsea Inquiry in 1856.

<sup>5</sup> *Home v. Bentinck*, 2 Bro. and Bing. p. 161. *Dawkins v. Rokeby* (error), 8 L. R. (Q. B.) p. 266.



protected from publication. Their finding is, in fact, advice and information confidentially given to the Crown or General Officer, in furtherance of the exercise of a public duty upon the result of such inquiry.

11. The extraordinary circumstances under which the Chelsea Inquiry<sup>1</sup> was held in 1856, obliged the Ministers to depart from their *original* intention<sup>2</sup> of having that conducted as a confidential inquiry. Having submitted the Military efficiency of the General Officers in the Crimea to the decision of two gentlemen

“That never set a squadron in the field,  
Nor the division of a battle knew,”

and laid their *ex parte* statements before Parliament without the knowledge of those Officers to whom blame was imputed, *public* inquiry then became inevitable—an *exceptional* proceeding, which has not however varied the *rule*, viz., that these are confidential inquiries.<sup>3</sup>

12. Accepting the “analogy drawn” by Lord Chelmsford “between Courts of Inquiry and Grand Juries as perfectly correct,”<sup>4</sup> it is clear that there is and should be no trial of an accused person, nor has such (if any) person a *locus standi* before the Court, either to interfere in the proceedings, or to be present throughout, or to note down, if permitted to be present the statements made for the use and information of the Crown either for or against him. All public servants, Civil or Military no doubt are bound by the law of obedience to attend, if called upon to do so, where a Court of Inquiry may be summoned to meet. Being there, they speak not as sworn witnesses, but as persons offering such information as each in his discretion sees fit to tender; for the Court has no power to swear or to punish them as witnesses for contumacy or silence.<sup>5</sup> Such information as may be thus collected is, for convenience, arranged in the

<sup>1</sup> Report of Board of General Officers, printed by command, 1856.

<sup>2</sup> Contrast Lord Palmerston's Speeches on 21st and 28th Feb., in 140 H. B. (3) pp. 1052, 1480.

<sup>3</sup> The Case of Naval Courts of Inquiry, discussed in April 1863, 170 H. D. (3), pp. 381-395.

<sup>4</sup> 170 H. D. (3), p. 395.

<sup>5</sup> See C. M. Rep. qu. 4276-7, and Ch. Bar. Kelly's Judgment in *Dawkins v. Rokeby*, 8 L. R. (Q. B.) p. 266.

same form as that used by a Court-martial;<sup>1</sup> each member signing the Report, which is sent to the Convening Authority through the President.

13. The ultimate use which is to be made of information thus obtained involves very different considerations. Before any one is prejudiced by the result it would appear desirable, if not demanded by Justice, that the substance of the charge be communicated, and an opportunity of explanation be afforded to him; while, on the other hand, to disclose—as in a late case was done—all the proceedings of the Court<sup>2</sup> to the offending Officer is to violate the fundamental condition of secrecy under which the servants of the Crown were induced to record their opinions either as members or as informants of the Court. In this matter the Crown or Executive Officer, having formed a Court and invited information, is bound to withhold<sup>3</sup> the Record from publication; for a disclosure too frequently exposes those entitled to this protection to a merciless persecution from the offending Officer whose conduct has been under investigation.<sup>4</sup>

14. Whether these Courts should be recognized by the Mutiny Act or Articles of War, and, if recognized, have extended powers given to them, is a question which Mr. Tytler raised in his 'Essay upon Military Law.'<sup>5</sup> Since then a Secretary at War has desired that their proceedings should be judicial, and their investigations carried on under the sanction of an oath.<sup>6</sup> With the exception of what will be mentioned in the concluding portion of this Chapter, nothing has been done;<sup>7</sup> nor is anything so much needed as definite instructions as to the method in which these extra-judicial inquiries should be conducted by the Court, and as to the rules by which Ministers

<sup>1</sup> L. R. par. 786, *post*.

<sup>2</sup> 170 H. D. (3) p. 389.

<sup>3</sup> *Beaton v. Skene*, 5 H. and N. p. 838; and Vol. I. p. 189.

<sup>4</sup> In *Dickson's Case*, an Attorney and shorthand writer were admitted to attend the Inquiry, and a flood of litigation overwhelmed all the servants of the Crown, from the Secretary of State down to the Colonel of the Regiment. (*Dickson v. Wilton*, 1 Fost. and Fin. p. 419; *Same v. Combermere*, 3 *ib.* p. 527). In *Dawkins' Case*, the same thing happened, and with the same result. *Dawkins v. Rokeby*, 4 *ib.* p. 806. *Same v. Pawlett*, 9 B. and S. p. 768; still pending.

<sup>5</sup> Page 348. <sup>6</sup> *Case*, and Law Officers' Reports in 1803, Vol. I. pp. 541-550.

<sup>7</sup> As to Naval Courts of Inquiry under the Merchant Shipping Act, 17 & 18 Vic. c. 104, see. 260-269.

as Privy Councillors should be guided in using the information thus afforded to them.<sup>1</sup>

## II. As to Courts of Inquiry under Statutory Authority.<sup>2</sup>

15. In entering upon the second division of the subject, it may be convenient to enumerate the several Courts, Boards, or Committees of Inquiry that are authorized to be assembled under Articles of War or Statute with reference to Military Law or Procedure.

1st. Under the Articles of War, one or other of these may be assembled to inquire, and then

- (a) To report on Wounded Officers.
- (b) To report on Discharged Soldiers.
- (c) To report on a Soldier's Bodily Injuries.
- (d) To report on a Soldier's Desertion.
- (e) To report on a Soldier's Claims.

These generally relate to the Regular Army; but when other Forces are subject to the Mutiny Act, these provisions of the Articles of War would in some measure be applicable to them.

2ndly. (f) Under the Regimental Debts Act, for the collection of the assets, &c., of a deceased Officer or Soldier on Service.

3rdly. (g) Under the Volunteer Act, 1863, to report on matters submitted by the Convening Authority.

1st. Under the Articles of War.

16. Courts or Boards of Inquiry are not referred to in the Mutiny Act; but, since the year 1829, the Articles of War have directed the assembly of these Tribunals for the several specific purposes which I have previously enumerated. As no alterations in the Law has been made with regard to two of the

now established, it may be convenient to treat of them in the next preface.

Upon referring to Article 88 of 1830, which is identical with Article 45 in the Appendix, it will be seen that

<sup>1</sup> *Journal of State*, see Vol. II. p. 730.

<sup>2</sup> *See* Courts may be given in Evidence was discussed in *Mason v. John*, 2 Bain Rep. 215; *Fox v. Wood*, 1 Rawl

"for the purpose of securing a provision for life to any Officer wounded before the Enemy, the Secretary of State may convene a Military Medical Board of not more than five nor less than three Medical Officers, to inspect and report upon the state of the Officer's wound. The Article supposes the Board to be cognizant of "the Rules and Regulations for granting Pensions to Wounded Officers," inasmuch as the "Declaration" (which each member is to make in the presence of the Wounded Officer) requires him impartially to inquire into and give his opinion on the case according to the true spirit and meaning thereof. They, like the Judges of a Court-martial, are sworn to secrecy, and their Report goes through the Director-General of the Army Medical Department to the War Office, for official use.

18. (b) Upon referring to the 87th Article of 1830, which is the same as Article 166, it will be seen that "to secure to the deserving Soldier when discharged" a provision proportioned to the length and nature of his service, and to enable the Chelsea Commissioners to carry out "the Rules and Regulations for Pensioning Soldiers," "the services, conduct, character, and cause, of the discharge" of every Soldier are to be ascertained before a Regular Board, to be held for the purpose of verifying and recording all these necessary particulars. The Board is to consist of three Officers; the second in Command being the President, and the two next Senior Officers on the spot being members. Every Military person who may be summoned by the President is to attend and give to the Board such information as he possesses on the subject of the Inquiry. The duty of the Board is "restricted to the faithful and impartial record of the Soldier's services and conduct at the close of his Military career," and they are to be governed in the discharge of it by the Pension Regulations (which are to be produced before the Board), and by the "Declaration" (which each Member is to make in the presence of the Soldier whose case is under inquiry) upon honour duly and impartially to inquire into the matters brought before them; and, in doubt, "according to my conscience, the best of my understanding, and the custom of the Service in like cases."

19. (c) The interests of the Officer and Soldier having been thus protected by Lord Hardinge, by whom these arrangements

were initiated, he—not unmindful of public interests, nor ignorant of the frauds that were then, as now, not unfrequently practised against them—directed an inquiry by Court-martial (but which is now to be otherwise conducted), to detect malin-gering or self-inflicted injuries. On turning to the 82nd Article<sup>1</sup> in the Appendix, it will be seen that whenever a Soldier, either on or off duty, shall become maimed, mutilated, or injured (except by wounds in action), he shall be forthwith brought before a Court of Inquiry.

20. The manner in which this Court is to be formed is not prescribed; but the purpose of it is to report their opinion whether the maiming, mutilating, or injuring was occasioned by design. If they report it as occasioned by the designed and wilful act of the Soldier (or by any other person at his instance) to render himself unfit for Service, then he is forthwith to be brought to trial before a General or District Court upon the charge of disgraceful conduct; and the proceedings of the Court of Inquiry are to be sent up (through some circumlocution) to the Chelsea Commissioners for their guidance upon the Soldier's ultimate discharge and application for Pension.

21. (*d*) Another inquiry was originated by Lord Hardinge in the Articles of 1829,<sup>2</sup> which is now directed to be carried out under 167th of the present Code. The Article as originally framed, and as it continued till the year 1857, authorized an inquiry which—not being made on oath—was of little value other than as a Regimental Record of a Soldier's absence or Desertion. In the latter year, however, the Article was so altered as to supply in some degree what the Duke of Wellington<sup>3</sup> thought so essential, viz., evidence recorded of a fact which should be judicially accepted, though the Witnesses did not appear before the Prisoner at his trial.

22. Upon reference to the Article, it will be seen that, after a

<sup>1</sup> In 1830 this Art. was 41, and in 1840 it was 40. In 1847 it was 82, and so continued till 1858, when a Court of Inquiry was substituted for a Court-martial in the preliminary investigation.

<sup>2</sup> It was 89 in that year, 82 in 1830, 147 in 1857, when the Art. was essentially altered in its effect by amendment; then 171 in 1860, and 167 in 1869, when the inquiry was to be made after twenty-one days' absence, and not after two months', as theretofore.

<sup>3</sup> Chap. IX. par. 52, *ante*.

Soldier has been illegally absent from his duty for twenty-one days, a Court of Inquiry, consisting of three Officers, shall forthwith assemble, who are empowered to examine Witnesses upon oath respecting the fact of such absence;<sup>1</sup> and, having received proof on oath of the fact, they are to declare such absence and the period thereof, and the Commanding Officer is to enter a Record of such absence and declaration in the Regimental Books.

23. Looking at Desertion as (it formerly was) a serious offence, punishable either by death or penal servitude, the effect which the Article gives to this entry is open to controversy; for, should the Soldier not surrender, this Record has the legal effect of a conviction for Desertion, or, upon his surrender and arraignment, is admissible as evidence of Desertion, upon which—proof of identity being given—the Soldier may be found Guilty.

24. (e) I have before remarked<sup>2</sup> that the Articles of 1672 provided for the redress of wrongs inflicted by the Superior upon the Inferior Officer—the remedy given by the Articles of 1717 being “Justice done to the Complainant at a Regimental Court-martial.”<sup>3</sup> The same provision continued until the year 1860, when Article 13 in the Code was altered as it now stands—from a Court-martial to a Court of Inquiry—the subject of investigation being, as between the Soldier and the Complainant, a matter “affecting Pay or Clothing.” At no time was the decision of the Regimental Court final, but either of the dissatisfied parties could appeal (as now) to a General Court—at the risk of Punishment being awarded by such Court, should the Appeal be pronounced groundless and vexatious.

2ndly. Under the Regimental Debts Act, 1863.

25. In all the Military Codes,<sup>4</sup> from the earliest to the latest, some provision has been made for the collection and distribution of the effects of the Deceased Officer and Soldier. In our Modern Code this provision was found in the Articles of War (supplemented by some provision in the Statute Law) until

<sup>1</sup> And the deficiency of kit, which is not material for the present.

<sup>2</sup> Chap. I. par. 34; and Chap. VI. par. 13.

<sup>3</sup> Art. 19.

<sup>4</sup> In 1639, see Vol. I. p. 438. In 1642, *ib.* p. 444. In 1666, *ib.* p. 448. In 1672, Art. 70. In 1686, Art. 59. In 1717, Art. 45. In 1872, sec. 98; see Chap. II. para. 32 and 35, and App. L. *post.* And see Grant v. Gould, *sup.*

1863, when the Act (which is named at the head of this paragraph) was passed for that object.

26. (f) Upon reference to its provisions and to the Regulations put forth under the authority contained in the Act (which will be found in the Appendix I) it will be seen that, on the death of an officer or Soldier *on Service*, a Committee of Officers, as prescribed by the Regulations, is to be appointed by the Commanding Officer to secure his effects, and to make an inventory thereof, and an account of his Debts and Credits. The duty here imposed is Statutory, and each Officer is responsible to those interested in the Deceased's estate for their acts of omission or commission, so far as either may justly become the subject of complaint.<sup>1</sup> The Committee have a prior title to the Deceased's assets against all other claimants, until the preferential charges be paid or their authority superseded by the Deceased's widow or next of kin, in the manner which the Act provides. Whether or how far this Act may be held to apply to Officers or Soldiers, other than those of the Regular Army, has not been determined, but its provisions are obviously intended to meet the case of persons dying in places beyond their ordinary domicile.

3rdly. Under the Volunteer Act, 1863, and Regulations.

27. The only Statutory provisions having reference to the Auxiliary Forces are those which are contained in the Volunteer Act, 1863, and in the Regulations put forth under that Statute. Resort has not unfrequently been had to the assistance of these Courts to aid the Lord Lieutenant in the general administration of the Volunteer Force.

28. (g) By reference to the Act and Regulations printed in the Appendix,<sup>2</sup> it will be seen, first, that the Lieutenant of the County might, and the Crown now may, assemble a Court to inquire into any matter relative to the Corps or to any Officer or Volunteer, and to record the facts and circumstances ascertained on such inquiry, and, if required, to report on the same for the information and assistance of the Crown.

2ndly. That the Commanding Officer may, in like manner,

<sup>1</sup> Vol. I. p. 213.

<sup>2</sup> Appendix M.

assemble a Court to inquire into any matter relative to the Corps or to *any Volunteer*, not being a Commissioned Officer of the Force.

Neither of these Courts can administer an oath,<sup>1</sup> and each must be guided in the discharge of its duties by the Regulations put forth and printed elsewhere.

29. With regard to these Statutory or quasi-statutory Courts, the purpose and method of their inquiry must be strictly confined to the terms of the Statute or Article under which they derive their authority. Where directed to summon Witnesses, the Courts are competent (I apprehend) to swear<sup>2</sup> them and to take their testimony as of record. Each Court should also be constituted as directed, for the Jurisdiction and Finding (as in *d*) would otherwise be void. In cases where the inquiry is preliminary (as in *c* and *e*), the discretion which is given by the Articles would not be so narrowly watched.

30. In concluding this Chapter, it may be well to remark that the inquiries embraced in this division of the subject, some of which partake of the nature of Judicial proceedings, are not all to be considered as secret or confidential in the same sense as those words imply when used in reference to inquiries treated of in the first Division. For where persons give their testimony under the sanction of an oath and upon legal summons from the Crown, their information is scarcely voluntary; nor can they say that they have been invited to make statements under the representation that they would be received and treated as "Confidential" Communications.

<sup>1</sup> *Kempe v. Neville*, 10 C.B. (N.S.) 553.

<sup>2</sup> 14 & 15 Vic. c. 99, sec. 16.





## APPENDIX.

### APPENDIX A.—CHAP. II. PAR. 1.

THE FIRST MUTINY ACT (1 WILLIAM & MARY, CAP. 5) AS  
AMENDED DOWN TO AND INCLUSIVE OF THE YEAR 1717.

*“An Act for punishing Officers or Soldiers who shall Mutiny or Desert  
their Majestyes Service [and for punishing false<sup>1</sup> Musters] [and<sup>2</sup>  
for payment of [the<sup>3</sup> Army and] Quarters].<sup>2</sup>*

“WHEREAS, the raising or keeping a standing Army within this  
kingdome in time of peace unlesse it be with consent of Parlyament  
is against law. And whereas it is judged necessary by their  
Majestyes and this present Parlyament That durence this time of  
Danger<sup>4</sup> severall of the Forces which are now on foote should be  
continued and others raised for the Safety of the Kingdome for the  
common defence of the Protestant Religion and for the reducing of  
Ireland.

“And whereas noe man may be forejudged of Life or Limbe, or  
subjected<sup>5</sup> [in time of peace] to any kinde of punishment [within  
this Realm] by Martiall Law, or in any other manner than by the  
judgement of his Peeres, and according to the knowne and Esta-  
blished Laws of this Realme. Yet neverthelesse, it being requisite  
for retaincing such Forces as are or shall be raised durence this  
exigence of Affaires in their Duty an exact Discipline be observed.  
And that Soldiers who shall Mutiny or Stirr up Sedition, or shall  
desert Their Majestyes Service [within this Realm or the Kingdom  
of Ireland] be brought to a more exemplary and speedy Punishment  
than the usuall Forms of Law will allow.

2. “Bee it therefore Enacted by the King and Queenes most  
Excellent Majestyes by and with the Advice and Consent<sup>Exciting  
mutiny.</sup>  
of the Lords Spirituall and Temporall and Commons in  
this present Parlyament assembled, and by authoritie of the same.

<sup>1</sup> The first and last insertion [ ] were in 1 and 2 William & Mary, sess. 2, c. 4, and 10 Anne, c. 33.

<sup>2</sup> First inserted in 2 & 3 Anne, c. 16.

<sup>3</sup> First inserted in 4 William and Mary, c. 13.

<sup>4</sup> Chap. II, par. 8.

<sup>5</sup> These words in [ ] inserted in the 1st Mutiny Act of Queen Anne's reign.  
<sup>1</sup> Anne, Stat. 2, c. 20 [or 16].

That from and after the 12th day of Aprill, A.D. 1689, every person being in Their Majestyes Service in the Army, and being mustered and in pay as an Officer or Soldier, who shall at any time before the 10th day of November, A.D. 1689, excite, cause, or joyn in any mutiny or sedition in the Army or shall desert Their Majestyes Service in the Army, <sup>1</sup>shall suffer death or such other punishment as by a Court-Martiall shall be inflicted.

Punishment.

3. "And it is hereby further enacted and declared, That Their Majestyes, or the Generall of their Army for the time being, may by vertue of this Act have full power and authoritie to grant Commissions to any Lieftenants, Generall or other Officers, not under the degree of Collonells, from time to time to call and assemble Court-Martials for punishing such offences as aforesaid.

Crown may grant Commissions to call Court-martial.

4. " <sup>2</sup> And it is hereby further enacted and declared, That noe Court-Martiall which shall have power to inflict any punishment by vertue of this Act for the offences aforesaid shall consist of fewer than thirteene, whereof none to be under the degree of Captaines.

Number of Members.

5. "Provided alwayes, That no field Officer be tryed by other

<sup>1</sup> The following words were inserted in 1716:—

*Extract from sec. 1 of 3 Geo. I. c. 2 (1716).*

"[Or persuade, or advise any other Soldier in His Majesty's Service, to desert His Majesty Service in the Army; or if an Officer or Soldier in His Majesty's Army shall, either upon land within or out of Great Britain or upon the sea, hold correspondence with any rebel or enemy of His Majesty or give them advice or intelligence either by letters, messages, signs, or tokens, or any manner of way whatsoever, or shall treat with such rebels or enemies or enter into a correspondence with them without His Majesty's licenae or license of the General; or shall refuse to obey the Military order of his Superior Officer or shall resist any Officer in the execution of his office, or shall strike, draw, or offer to draw or lift up any weapon against his Superior Officer upon any pretence whatsoever, or being a Soldier actually listed in any Regiment shall list himself into any other Regiment without a discharge from the first Regiment]."

In 1717 these words were omitted, and the following substituted:—

*Extract from sec. 1 of 4 Geo. I. c. 3, 1717.*

"[Or being a Soldier actually listed in any Regiment shall list privately in another without a discharge, or shall refuse to obey any lawful command of his superior officer]."

The other offences of 1716 were transferred to the Articles of War 1717.

<sup>2</sup> In 1717 as sec. 3 of 4 Geo. I. c. 3, this was inserted. "That it shall be lawful to, and for such Court-martials by their sentence or judgment, to inflict corporal punishment not extending to life or limb on any Soldier for immoralities, misbehaviour, or neglect of duty."

than field Officers. And that such Court-Martiall shall have power and authoritie to administer an oath to any witness in order to the examination or tryall of the offences aforesaid.

Field Officers  
how tried.  
Colonel may  
administer  
oath.

6. "Provided alwayes, That nothing in this Act contained shall extend or be construed to exempt any Officer or Soldier whatsoever from the ordinary processe of Law.

Proviso for  
ordinary pro-  
cesse of Law.

7. "Provided alwayes, That this Act, or anything therein contained, shall not extend or be any wayes construed to extend to or concerne any of the Militia Forces of this Kingdome.

Act not to  
extend to  
Militia.

8. "Provided alsoe, That this Act shall continue and be in force untill the said 10th day of November, A.D. 1689.

Act in force  
till 10 Nov.  
1689.

9. "Provided alwayes, and bee it enacted, That in all tryalls of offenders by Courts-Martiall to be held by vertue of this Act, where the offence may be punished by Death, every Officer present at such tryall, before any proceeding be had thereupon, shall take an oath upon the Evangelists before the Court (and the Judge Advocate or his Deputy shall, and are hereby respectively authorized to administer the same) in these words, that is to say:—

Members of  
Court-  
martial to  
take an oath.

"You shall well and truly try and determine according to your evidence the matter now before you between Our Sovereigne Lord and Lady the King and Queen's Majestyes and the Prisoner to be tried,

"Soe helpe you God."

10. "And noe Sentence of Death shall be given against any offender in such case by any Court-Martiall unlesse nine of thirteene Officers present shall concur therein. And if there be a greater number of Officers present, then the judgement shall passe by the concurrence of the greater part of them soe sworne, and not otherwise; and noe Proceedings, Tryall, or Sentence of Death shall be had or given against any Offender, but betweene the houres of eight in the morning and one in the afternoone."<sup>1</sup>

Where sen-  
tence of death  
given. Num-  
ber of ma-  
jority of  
Officers.

<sup>1</sup> This section (as 40) was inserted in 1717. "That it shall be lawful for His Majesty to form, make, and establish Articles of War, and erect and constitute Courts-martial with power to try, hear, and determine any crime or offence by such Articles of War, and inflict penalties by sentence or judgment of the same as well within the Kingdoms of Great Britain and Ireland as in any of His Majesty's Dominions beyond the sea."

## APPENDIX B.—CHAP. II. PAR. 37.

PROVISIONS RELATING TO THE ADMINISTRATION OF JUSTICE  
BY COURTS-MARTIAL UNDER THE MUTINY ACT, 1873.

## GENERAL PRINCIPLES OF THE ACT:—

SECTION	PAGE
Preamble. Numbers .. .. .	212
1. Articles of War made by Her Majesty to be judicially taken notice of .. .. .	213
2. Persons subject to this Act .. .. .	213
3. Provisions of this Act to extend to Jersey, Guernsey, &c. .. .. .	215
4. Colonial and foreign troops in Her Majesty's pay to be subject to provisions of this Act .. .. .	215
5. Provision as to the militia or yeomanry or volunteer corps or reserve forces .. .. .	216

## CONSTITUTION OF COURTS-MARTIAL:—

6. Power to constitute courts-martial .. .. .	216
7. Place where offenders may be tried .. .. .	217
8. Constitution and powers of general courts-martial .. .. .	217
9. Constitution and powers of district or garrison courts-martial .. .. .	217
10. Constitution and powers of regimental or detachment courts-martial .. .. .	218
11. Courts-martial on line of march or in troop ships, &c. .. .. .	218
12. Constitution and powers of detachment general courts-martial .. .. .	218
13. As to swearing and summoning of witnesses. Oath to be administered to shorthand writer .. .. .	219
14. No second trial for the same offence, but revision may be allowed .. .. .	220

## CRIMES AND PUNISHMENTS:—

15. Crimes punishable with death .. .. .	220
16. Judgment of death may be commuted for penal servitude or other punishments .. .. .	221
17. Embezzlement, &c., of stores punishable by penal servitude, or by fine, imprisonment, &c. .. .. .	222
18. As to execution of sentences of penal servitude in the United Kingdom .. .. .	223
19. As to execution of sentences of penal servitude in the colonies, India, or elsewhere out of Her Majesty's dominions .. .. .	224
20. Power to commute penal servitude for imprisonment, &c. .. .. .	226
21. Of forfeitures, &c., when combined with penal servitude .. .. .	226
22. Not to inflict corporal punishment in time of peace .. .. .	226
23. Power to inflict corporal punishment and imprisonment .. .. .	226
24. Power to commute corporal punishment for imprisonment, &c. .. .. .	227
25. Power to commute a sentence of cashiering .. .. .	227
26. Power of imprisonment by general, garrison, or district courts-martial .. .. .	227
27. Power of imprisonment by regimental or detachment courts-martial .. .. .	227
28. As to imprisonment of offenders already under sentence .. .. .	227

**MILITARY PRISONS AND CIVIL GAOLS :—**

SECTION	PAGE
1. Regulations as to military prisons .. .. . (See also clause 83 extending provisions of Gaol Acts to military prisons.)	228
2. As to the custody of military offenders under sentence of court-martial, and in other cases .. .. .	229
3. As to the removal or discharge of prisoners in certain cases .. .. .	230
4. Provision for subsistence of soldiers when imprisoned in common gaols	232
5. Notice of expiration of imprisonment of soldiers in common gaols to be given to the Secretary of State for the War Department, &c.	232

**DESERPTION :—**

6. Apprehension and transfer of deserters in the United Kingdom and in Her Majesty's foreign dominions .. .. .	233
7. As to the temporary custody of deserters in gaols .. .. .	235
8. Desertion of recruits prior to joining their regiments or corps .. .. .	236
9. Fraudulent confession of desertion .. .. .	236

**EXTENSION OF FURLOUGH :—**

10. Extension of furlough in case of sickness .. .. .	237
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**PRIVILEGES OF SOLDIERS :—**

11. No person acquitted or convicted by the civil magistrate or by a jury to be tried by a court-martial for the same offence .. .. .	237
12. Soldiers liable to be taken out of Her Majesty's service only for felony, misdemeanor, or for debts amounting to 30 <i>l.</i> and upwards; but soldiers not liable to be taken out of the service for debts under 30 <i>l.</i> , or for not maintaining their families, or for breach of contract .. .. .	238
13. Officers not to be sheriffs or mayors, &c. .. .. .	240

**ENLISTMENT :—**

14. Attested recruits triable in some cases either before two justices or before a court-martial .. .. .	240
15. As to militiamen enlisting into the army .. .. .	241
16. Punishment of persons offending against the laws relating to enlistment .. .. .	242
17. Definition: Non-commissioned Officers and Soldiers .. .. .	242

**PENALTIES AT LAW UNDER THIS ACT :—**

18. Ordinary course of criminal justice not to be interfered with. Punishment of officers obstructing civil justice .. .. .	242
19. Form of actions at law .. .. .	242

**MISCELLANEOUS :—**

20. Administration of oaths. Persons taking false oaths or declarations liable to punishment for wilful perjury .. .. .	243
21. Offences against former Mutiny Acts and Articles of War may be tried under this Act .. .. .	244
22. As to the Regimental Debts Act, 1863 .. .. .	245
23. Where troops are serving beyond the jurisdiction of the courts of requests, &c., actions of debt not exceeding 400 rupees to be cognizable by a Military court. Composition and constitution of the court prescribed. President, &c., of court to take oath. Powers of court defined .. .. .	245

SECTION	PAGE
100. Provisions relating to courts-martial on officers and soldiers of Her Majesty's Indian forces .. .. .	247
101. As to trial of officers and soldiers serving in India .. .. .	247
103. Definition of the Commander-in-Chief .. .. .	248
105. Militia may be attached to regular forces .. .. .	249
106. Yeomanry or volunteers may be attached to regular forces .. .. .	249

## THE MUTINY ACT FOR 1873-74.

### EXTRACTS FROM

AN ACT FOR PUNISHING MUTINY AND DESERTION, AND FOR  
THE BETTER PAYMENT OF THE ARMY AND THEIR  
QUARTERS. 36 Vic. c. 10. [24th April 1873.]

WHEREAS the raising or keeping a standing army within the United Kingdom of Great Britain and Ireland in time of peace, unless it be with the consent of Parliament, is against law: — AND whereas it is adjudged necessary by Her Majesty, and this present Parliament, that a body of forces should be continued for the safety of the United Kingdom and the defence of the possessions of Her Majesty's

Crown, and that the whole<sup>1</sup> number of such forces should consist of one hundred and twenty-eight thousand nine hundred and sixty-eight men, including those to be employed at the depôts in the United Kingdom of Great Britain and Ireland for the training of recruits for service at home and abroad, but exclusive of the numbers actually serving within Her Majesty's Indian possessions: —

AND whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by judgment of his peers, and according to the known and established laws of this realm; — yet nevertheless it being requisite, for the retaining all the before-mentioned forces in their duty, that an exact discipline be observed, and that soldiers who shall mutiny or stir up sedition or shall desert Her Majesty's service, or be guilty of crimes and offences to the prejudice of good order and military discipline, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow: — BE it

<sup>1</sup> Should the Army, in fact, exceed this number, the liability to the Mutiny Act would not be affected by the excess. See Vol. I. p. 178, and the discussion in Parliament, 14 Parl. Hist. pp. 434, 461, 27 Parl. Hist. p. 169. However, See Sec. 95 of Mutiny Act, 1869 & 1872.

therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. IT shall be lawful for Her Majesty to make Articles of War for the better government of Her Majesty's army<sup>1</sup> which articles shall be judicially taken notice of by all judges and in all courts whatsoever; — and copies of the same, printed by the Queen's printer, shall, as soon as may be after the same shall have been made and established by Her Majesty, be transmitted by Her Majesty's Secretary of State for the War Department to the judges of Her Majesty's superior courts at Westminster, Dublin, and Edinburgh respectively, and also to the governors of Her Majesty's dominions abroad : — PROVIDED that no person within the United Kingdom of Great Britain and Ireland, or within the British Isles,<sup>2</sup> shall by such Articles of War be subject to suffer any punishment extending to life or limb, or to be kept in penal servitude, except for crimes which are by this Act expressly made liable to such punishments as aforesaid, or shall be subject, with reference to any crimes made punishable by this Act, to be punished in any manner which shall not accord with the provisions of this Act : —<sup>3</sup> PROVIDED also, that nothing in this Act contained shall in any manner prejudice or affect any Articles of War<sup>4</sup> or other matters made, enacted, or in force, or which may hereafter be made, enacted, or in force, under the authority of the Government of India, respecting officers or soldiers or followers in Her Majesty's Indian army, being natives of India; and on the trial of all offences committed by any such native officer or soldier or follower, reference shall be had to the Articles of War framed by the Government of India for such native officers, soldiers, or followers, and to the established usages of the service.

2. ALL the provisions of this Act shall apply to all persons who are or shall be commissioned<sup>5</sup> or in pay as an officer, or who are

<sup>1</sup> If for any other purposes, the Articles would be *ultra vires* under this section. They can only bind the persons liable to the Mutiny Act. Vol. I. pp. 149-150.

<sup>2</sup> This is worthy of notice, that there is no such limitation upon the operation of Articles in other places, and in each of which the validity of the Articles would have to be tested by the Rules laid down by Chief Justice Cockburn. See Vol. II. pp. 175-176; Chap. II. par. 21; Chap. X. par. 1, *ante*.

<sup>3</sup> Inserted in 1863.

<sup>4</sup> As to the authority on which these Articles stand, see Vol. I. pp. 181-187, and pp. 268-270, and Chap. II. par. 49.

<sup>5</sup> Volunteers serving without pay, or persons not Officers or Soldiers, but

Articles of War made by Her Majesty to be judicially taken notice of, and copies printed by the Queen's printer to be transmitted to Judges, &c.



or shall be listed or in pay as a non-commissioned officer or soldier and to all warrant officers, and to all persons employed on the recruiting service receiving pay, and all pensioners receiving allowances in respect of such service, and persons who are or shall be hired to be employed in the artillery, royal engineers, and to master gunners, and to conductors of stores, and to the corps of royal military surveyors and draftsmen and to all officers and persons who are or shall be serving in the Control Department,<sup>1</sup> and to officers and soldiers serving in the hospital corps, or the army service corps, and to persons in the Control Department, who are or shall be serving with any part of Her Majesty's army at home or abroad, under the command of any commissioned officer, and (subject to and in accordance with the provisions of an Act passed in the sixth and seventh years of the reign of Her present Majesty, chapter ninety-five,) to out-pensioners of the Royal hospital, Chelsea, who may be called on duty in aid of the civil<sup>2</sup> power, or for muster or inspection who having volunteered their services for that purpose shall be kept on duty in any fort, town, or garrison, and to all civil officers who are or shall be employed by or act under the Secretary of State for War at any of Her Majesty's establishments in the Islands of Jersey, Guernsey, Alderney, Sark, and Man, and the islands thereto belonging, or at foreign stations; —<sup>3</sup> [and all the provisions of the Act shall apply to all persons belonging to Her Majesty's Forces who are or shall be commissioned or in pay as officers or who shall be listed or in pay as non-commissioned officers or soldiers or who are or shall be serving or hired to be employed in the artillery or any of the trains of artillery, or as master gunners, or as conductors of stores, or who are or shall be serving in the department of engineers, or in the corps of sappers and miners, or pioneers, or as military surveyors or draftsmen, or in the Ordnance or public works or commissariat departments, and to storekeepers and other civil officers employed under the Ordnance and to all veterinary surgeons, medical storekeepers, apothecaries, hospital stewards, and others serving in the medical department of the said forces, and to all licensed sutlers, and all followers in any of the said forces:] — PROVIDED that nothing in this

receiving pay "as such," would be liable to the Act. Vol. I. pp. 178-179; II. par. 24.

<sup>1</sup> Chap. VII. par. 27.

<sup>2</sup> No one should be called out as part of the Army to aid the Civil Power without being under the Mutiny Act. The theory that a Soldier comes out as a "Citizen" is wholly untenable, and would lead to serious misapprehension. Vol. II. p. 143, and App. J. *post*.

<sup>3</sup> Added in 1863.

contained shall extend to affect any security<sup>1</sup> which has been or shall be given by any officers, or their sureties, for the due performance of their respective offices, but that all such securities shall be and remain in full force and effect.

3. THIS Act shall extend to the Islands of Jersey, Guernsey, Alderney, Sark, and Man and the islands<sup>2</sup> thereto belonging, as to the provisions herein contained for enlisting of recruits, whether minors or of full age, and swearing and attesting such recruits, and for mustering and paying, and as to the provisions for the trial and punishment of officers and soldiers who shall be charged with mutiny and desertion, or any other of the offences which are by this Act declared to be punishable by the sentence of a court-martial and also as to the provisions which relate to the punishment of persons who shall conceal deserters, or shall knowingly buy, exchange, or otherwise receive any arms, medals for good conduct or for distinguished or other service, clothes, military furniture, or regimental necessaries from any soldier or deserter, or who shall cause the colour of any such clothes to be changed, or who shall aid in the escape of a prisoner from a military prison, or who shall introduce forbidden articles into such prison, or shall carry out any such articles, or who shall assault any officer of such prison, and also as to the provisions for exempting soldiers from being taken out of Her Majesty's service for not supporting or for leaving chargeable to any parish any wife or child or children, or on account of any breach of contract to serve or work for any employer, or on account of any debts under thirty pounds in the said islands.

Provisions of  
this Act to  
extend to  
Jersey,  
Guernsey, &c.

4. ALL officers and soldiers of any troops mustered and in pay, which shall be raised and serving in any of Her Majesty's dominions abroad,<sup>3</sup> or in places in possession of or occupied by her Majesty's subjects under the command of any officer having any commission immediately from Her Majesty, shall be subject to the provisions of this Act and of Her

Colonial and  
foreign troops  
in Her Ma-  
jesty's pay to  
be subject to  
provisions of  
this Act.

<sup>1</sup> When Financial Civil Officers were turned into Military ones this proviso was needed. See 59 Geo. III. c. 9, s. 139, and Law Officers' and Mr. Harrison's opinions, Vol. I. p. 526.

<sup>2</sup> The Mutiny Act always applied to the Channel Islands so far as relates to mustering and paying the Army, but none of the other powers extended thereto. Nor did the Law Officers, in 1755, think it at all necessary that they should be made to extend to the Islands. Bk. 721, p. 112.

<sup>3</sup> Foreign Troops have usually been raised under the special authority of Parliament, and governed by a Special Code. See the Special Articles of War for the Foreign Troops in 1804, and Note on Foreign Soldiers, Vol. II. p. 431. As to American or Colonial Troops, see Chap. II. *ante*.

Majesty's Articles of War, in like manner as Her Majesty's other forces are ; — and if such officers and soldiers, having been made prisoners,<sup>1</sup> be sent into Great Britain or Ireland, although not allowed to serve therein, all the provisions of this Act in regard to billeting soldiers shall apply to such officers and soldiers.

5. NOTHING in this Act contained shall be construed to extend to any militia forces or yeomanry or volunteer corps in Great Britain or Ireland, or to the reserve force provided for by "The Reserve Force Act, 1867," or to the reserve force provided for by "The Militia Reserve Act, 1867,"<sup>2</sup> excepting [only as <sup>3</sup>herein-after enacted, or] where by any Act for regulating any of the said forces or corps the provisions contained in any Act for punishing mutiny and desertion are or shall be specifically made applicable to such forces or corps.

6. FOR the purpose of bringing offenders against this Act and against the Articles of War to justice, Her Majesty <sup>4</sup>may from time to time, in like manner as has been heretofore used, grant commissions under the Royal Sign Manual <sup>5</sup>for the holding of courts-martial within the United Kingdom of Great Britain and Ireland, and may grant commissions or warrants under the said Royal Sign Manual to the chief governor or governors of Ireland, the commander of the forces, or the person or persons commanding in chief, or commanding for the time being, any body of troops belonging to Her Majesty's army, as well within the United Kingdom of Great Britain and Ireland, and the British Isles, as in any of Her Majesty's garrisons and dominions or elsewhere beyond seas, for convening courts-martial, and for authorising any officer under their respective commands to convene courts-martial, as occasion

<sup>1</sup> This power was first taken during the American War for our Colonists who were captured. See 32 Geo. II. c. 5, s. 75. Foreign Soldiers could not be billeted. See Vol. I. p. 238.

<sup>2</sup> Hitherto this has been a fundamental principle, but how long it may so remain, or be so regarded by Parliament, is difficult to say. It simply refers, for the measure of their liability to the Mutiny Act, to the Code under which each of these Forces is raised. Chap V. par. 7.

<sup>3</sup> These important words were first inserted in 1872. Compare Mutiny Act, 1871.

<sup>4</sup> By the Mutiny Act 1669 and later Acts, "the General" had this statutory power conferred on him. See Chap. IV. par. 20.

<sup>5</sup> The Warrants are always issued under the countersign of a Secretary of State.

<sup>6</sup> This power may be executed by the donee of it in one of two methods :—

1. By convening a Court-martial ; or
2. By authorizing a Subordinate Officer under his command to convene such for the trial of those under such last-mentioned Officer.

may require, for the trial of offences committed by any of the forces under the command of any such last-mentioned officer, whether the same shall have been committed before<sup>1</sup> or after such officer shall have taken upon him such command — PROVIDED that the officer so authorised be not below the degree of a field officer, except in detached situations beyond seas where a field officer is not in command, in which case a captain may be authorised to convene district or garrison courts-martial: Every officer so authorised to convene courts-martial may confirm the sentence of any court-martial convened by him according to the terms of his warrant.<sup>2</sup>

7. ANY person subject to this Act who shall, in any part of Her Majesty's dominions or elsewhere, commit any of the offences for which he may be liable to be tried by court-martial by virtue of this Act or of the Articles of War, may be tried and punished for the same in any part of Her Majesty's dominions or in any other place<sup>3</sup> whereto he may have come or where he may be after the commission of the offence, as if the offence had been committed where such trial shall take place.

Place where  
offenders  
may be tried.

8. EVERY general court-martial convened within the United Kingdom or the British Isles shall consist of not less than nine commissioned officers, each of whom shall have held a commission for three<sup>4</sup> years before the date of the assembly of the court. Every general court-martial shall have power to sentence any officer or soldier to suffer death, penal servitude, imprisonment, forfeiture of pay or pension, or any other punishment which shall accord with the usage<sup>5</sup> of the service:—No sentence of death by a court-martial shall pass unless two-thirds at least of the officers present shall concur therein;—no sentence of penal servitude shall be for a period of less than five years;—and no sentence of imprisonment shall be for a period longer than two years.

Powers of general courts-martial.

9. EVERY district or garrison court-martial convened within the United Kingdom or the British Isles shall consist of not less than seven commissioned officers, and shall have the same power as

<sup>1</sup> This was inserted in 1804 by the advice of the Law Officers. Bk. 1, p. 230.

<sup>2</sup> This is a vital principle in the Military Administration of Justice, and the Officer must be careful to follow the terms of his Warrant. It was added to the section in 1865.

<sup>3</sup> The Reports of Sir Charles Gould and the Law Officers on the 1753, printed in Vol. I. p. 539. Chap. VII. pars. 46, 47.

<sup>4</sup> This must be in that Service in which he is then acting as Judge of the Army or Militia, as he may be sitting in one or other of those.

<sup>5</sup> This relates rather to the measure than the nature of the punishment must (I apprehend) accord with the usages of English Law. See

a general court-martial to sentence any soldier to such punishments as shall accord with the provisions of this Act:—PROVIDED always, that no such district or garrison court-martial shall have power to try a commissioned officer, or to pass any sentence of death or penal servitude.

Powers of district or garrison courts martial.

10. A REGIMENTAL or detachment court-martial shall consist of not less than five commissioned officers, unless it is found to be impracticable<sup>1</sup> to assemble that number, in which case three shall be sufficient, and shall have power to sentence any soldier to corporal punishment, or to imprisonment, and to forfeiture of pay, in such manner as shall accord with the provisions of this Act.

Powers of regimental or detachment courts-martial.

11. IN cases of mutiny, and insubordination <sup>2</sup>[accompanied with personal violence,] or other offences committed on the line of march,<sup>3</sup> or on board any transport ship, convict ship, merchant-vessel, or troop ship, not in commission, the offender may be tried by a regimental or detachment court-martial, and the sentence may be confirmed and carried into execution on the spot<sup>4</sup> by the officer in the immediate command of the troops, provided that the sentence shall not exceed that which a regimental court-martial is competent to award.

Courts-martial on line of march or in troop ships, &c.

12. IT shall be lawful for any officer commanding any detachment or portion of troops serving in any place beyond seas where it may be found impracticable to assemble a general court-martial, upon complaint<sup>5</sup> made to him of any offence committed against the property or person of any

Powers of detachment general courts-martial.

<sup>1</sup> In the American Code, where the Court cannot proceed with less than a maximum of members, where "that number can be convened without manifest injury to the Service," the convening decision has been held conclusive, and the proceedings of the Court valid, though a less number be summoned. *Martin v. Molt*, 12 Whea. Rep. pp. 34-35. Chap. IX. par. 8. <sup>2</sup> Inserted in 1867.

<sup>3</sup> See Sec. 30 and Art. 135. A Soldier in Billet after the day's march was held by Judge Advocate Grant to be not included in this term, May 1834.

<sup>4</sup> This is a Drum-head Court-martial, which on Foreign Service may be conveniently resorted to. The Sentence may be confirmed and carried into execution on the spot, but the measure of Punishment must not exceed that which the Regimental Court can award. Though this Court appears to have been resorted to in the Peninsular War, it was not authorised by the Mutiny Act till 1830. Compare 10 Geo. III. with 11 Geo. IV. c. 74, s. 10; and see 7 Vic. c. 10, s. 10. The resort to such Courts in time of peace would be reprehensible. Vol. II. p. 177 (Note). Chap. IV. par. 23, and Chap. X. par. 12.

<sup>5</sup> The history of the introduction of this section, in 1814, is given in Vol. II. pp. 662-666, and in Vol. VI. of Wellington Despatches. Chap. VII. p. 23; Chap. IV. p. 13; Chap. IX. p. 12; Chap. XI. p. 11.

inhabitant of or resident in any country in which such troops are so serving, by any person serving with or belonging to Her Majesty's armies, being under the immediate command of any such officer, to convene a detachment general court-martial, which shall consist of not less than three commissioned officers, for the purpose of trying any such person;—and every such court-martial shall have the same powers in regard to sentence upon offenders as are granted by this Act to general courts-martial:—PROVIDED always, that no sentence of any such court-martial shall be executed until the general commanding the army of which such detachment or portion forms part shall have approved and confirmed the same.

13. ALL general and other courts-martial shall administer an oath to every witness or other person who shall be As to swearing and summoning of witnesses. examined before such court<sup>1</sup> in any matter relating to any proceeding before the same;—and every person, as well civil as military, who may be required to give [or produce<sup>2</sup>] evidence before a court-martial, shall, in the case of general courts-martial, be summoned by the judge advocate general, or his deputy, or the person officiating as judge advocate, and in the case of all other courts-martial by the president of the court;—and all persons so summoned and attending as witnesses before any court-martial shall,<sup>3</sup> during their necessary attendance in or on such courts, and in going to and returning from the same, be privileged from arrest, and shall, if unduly arrested, be discharged by the court out of which the writ or process issued by which such witness was arrested;—or if such court be not sitting, then by any judge of the superior courts of Westminster or Dublin or of the Court of Session in Scotland, or of the courts of law in the East or West Indies, or elsewhere, according as the case shall require upon its being made to appear to such court or judge, by any affidavit in a summary way, that such witness was arrested in going to or attending upon or returning from such court-martial;—and all witnesses so duly summoned as aforesaid who shall not attend on such courts, or attending shall refuse to be sworn, or being sworn shall refuse to give evidence, for not produce<sup>4</sup> the documents under their power or control required to be produced by them, or to answer all such questions as the court may legally demand of them,

<sup>1</sup> Before the full Court and a representative of the accused witnesses to take evidence.

<sup>2</sup> These (like others, witnesses before courts-martial, are entitled to have reasonable expenses in going to defend themselves paid by the Government. The Home Office scale for the Witnesses at Courts-martial is £100 per annum, as fixed by the War Office. As to the other general scale, see 12, para. 13, of the

<sup>3</sup> Inserted in 1849

shall be liable to be attached in the Court of Queen's Bench in London or Dublin, or in the Court of Session or sheriff or steward courts in Scotland, or in courts of law in the East or West Indies, or in any of Her Majesty's colonies, garrisons, or dominions in Europe or elsewhere respectively, upon complaint made, in like manner as if such witness, after having been duly summoned or subpoenaed, had neglected to attend upon a trial in any proceeding in the court in which such complaint shall be made — PROVIDED always, that nothing in this Act contained shall be construed to render an oath necessary in any case where by law a solemn affirmation may be made instead thereof: — <sup>1</sup>IT shall be lawful for the president of any court-martial to administer an oath to a shorthand writer to take down according to the best of his power, the evidence to be given before the court.

Oath to be administered to shorthand writer.

14. NO officer or soldier who shall be acquitted or convicted of any offence shall be liable to be tried <sup>2</sup> a second time by the same or any other court-martial for the same offence; — and no finding, opinion, or sentence given by any court-martial, and signed by the president thereof, shall be revised, more than once, nor shall any additional evidence in respect of any charge on which the prisoner then stands arraigned be received by the court on any revision.

No second trial for the same offence, but revision may be allowed.

15. IF any person subject to this Act <sup>3</sup> shall at any time during the continuance of this Act begin, excite, cause, or join in any mutiny or sedition in any forces belonging to Her Majesty's army, or Her Majesty's royal marines, or shall not use his utmost endeavours to suppress the same, [or <sup>4</sup> shall conspire with any other person to cause a mutiny,] or coming to the knowledge of any mutiny or intended mutiny shall not, without delay, give information thereof to his commanding officer; — or shall hold correspondence with or give advice or intelligence to any rebel or enemy of Her Majesty, either by letters, messages, signs, or tokens, in any manner or way whatsoever; — or shall treat or enter into any terms with such rebel or enemy without Her Majesty's license,

Crimes punishable with death.

<sup>1</sup> Added in 1865.

<sup>2</sup> The words, "tried a second time for the same offence," must be noted. The rule of ordinary Criminal Justice is, "that no man be brought into jeopardy more than once for the same offence," *Rex v. Taylor*, 3 Bar. and Cress. p. 502. If the first be not a trial completed, the plea would not (I apprehend) avail. *Winsor v. the Queen*, 6 B. and S. p. 143, and 7 *ib.* p. 491. As to the history of the section see Vol. I. pp. 165-167, and Vol. II. p. 361; Chap. II. par. 3, *ante*; and Chap. IX. pars. 45 to 75.

<sup>3</sup> Compare this section with section 1 of the Mutiny Act, 1716, Appendix A, *ante*.

<sup>4</sup> Inserted in 1867.

or license of the general or chief commander; — or shall misbehave himself before the enemy; — or shall shamefully abandon or deliver up any garrison, fortress, post, or guard committed to his charge, or which he shall have been commanded to defend; — or shall compel the governor or commanding officer of any garrison, fortress, or post to deliver up to the enemy or to abandon the same; — or shall speak words or use any other means to induce such governor or commanding officer, or others, to misbehave before the enemy, or shamefully to abandon or deliver up any garrison, fortress, post, or guard committed to their respective charge, or which he or they shall be commanded to defend; — or shall desert Her Majesty's service; — or shall leave his post before being regularly relieved; — or shall sleep on his post; — or shall strike or shall use or offer any violence against his superior officer, being in the execution<sup>1</sup> of his office, or shall disobey any lawful command of his superior officer;<sup>2</sup> — or who being confined in a military prison shall offer any violence against a visitor or other his superior military officer, being in the execution of his office;<sup>3</sup> — all and every person and persons so offending in any of the matters before mentioned, whether such offence be committed within this realm or in any other of Her Majesty's dominions, or in foreign parts, upon land or upon the sea, shall suffer death, or penal servitude; — or such other punishment<sup>4</sup> as by a court-martial<sup>5</sup> shall be awarded: — PROVIDED always, that any non-commissioned officer or soldier attested for or in pay in any regiment or corps who shall, without having first obtained a regular discharge<sup>6</sup> therefrom, enlist himself in Her Majesty's army, may be deemed to have deserted Her Majesty's service, and shall be liable to be punished accordingly.

16. IN all cases where the punishment of death shall have been awarded by a general court-martial or detachment general court-martial it shall be lawful for Her Majesty, or, if in any place out of the United Kingdom or British Isles, for the commanding officer

<sup>1</sup> A non-combatant—as a Surgeon—is entitled to the protection of this section (L. O. to Adm. 26th Feb. 1842). The history of this paragraph, introduced in 1728, is found in the letters, &c., printed Vol. I. pp. 511–515. “Murder” would not be triable under this section, but under the Homicide Act, 1862. See Vol. I. p. 207, and Vol. II. pp. 147–153. <sup>2</sup> Chap. II. par. 27. <sup>3</sup> Inserted in 1846.

<sup>4</sup> Only one—not more punishments. Thus, in 1815, the L. O. held (1) “Imprisonment, and (2) Corporal Punishment, not warranted (Hough, 1825, p. 90, note); but the Commanding Officer, by confirming the legal, and not the illegal, could make the sentence valid. Hutton v. Blaine, 2 Serj. and Rawle, p. 75.

<sup>5</sup> This discretion cannot be taken from the Court except by the authority of Parliament, Vol. I. p. 518. The King v. Suddis, 1 East. Rep. p. 310.

<sup>6</sup> This principle is as old as the Mutiny Act, but this proviso was inserted in 1783.



having authority to confirm the sentence, instead of causing such sentence to be carried into execution, to order the offender to be kept in penal servitude<sup>1</sup> for any term not less than five years, or to suffer such term of imprisonment, with or without hard labour, and with or without solitary confinement, as shall seem meet to Her Majesty, or to the officer commanding as aforesaid.

Judgment of death may be commuted for penal servitude or other punishments.

17. ANY officer or soldier of Her Majesty's army, or any person employed in the War Department, or in any way concerned in the care or distribution of any money, provisions, forage, arms, clothing, ammunition, or other stores belonging to Her Majesty's army or for Her Majesty's use, who shall embezzle,<sup>2</sup> fraudulently misapply, wilfully damage, steal, or receive the same, knowing them to have been stolen, or shall be concerned therein or connive thereat, may be tried for the same by a general court-martial, and sentenced to be kept in penal servitude for any term not less than five years, or to suffer such punishment of fine, imprisonment, with or without hard labour, dismissal from Her Majesty's service, reduction to the ranks if a warrant or non-commissioned officer, as such court shall think fit, according to the nature and degree of the offence; — and every such offender shall, in addition to any other punishment, make good at his own expense the loss and damage sustained, and in every such case the court is required to ascertain by evidence the amount of such loss or damage, and to declare by their sentence that such amount shall be made good by such offender; and the loss and damage so ascertained as aforesaid shall be a debt to Her Majesty, and may be recovered in any of Her Majesty's courts at Westminster or in Dublin, or the Court of Exchequer in Scotland, or in any court in Her Majesty's colonies, or in India, where the person sentenced by such court-martial shall be resident, after the said judgment shall be confirmed and made known, or the offender, if he shall remain in the service, may be put under stoppages not exceeding one-half<sup>3</sup> of his pay and allowances until the amount so ascertained shall be recovered.

Embezzlement, &c., of stores punishable by penal servitude, or by fine, imprisonment, &c.

<sup>1</sup> As to the necessity for this Statutory Power, which was first given in 1728, see Reports of Lord Hardwicke (then Sir P. Yorke), Vol. I. pp. 509-514. The section was amended in 43 Geo. III. c. 20, s. 4. Chap. II. par. 12; Chap. X. par. 16.

<sup>2</sup> Embezzlement of public stores, &c., was a Military offence, by the earlier Articles of War (See s. 13 Art. 1 of 1749), and in 1809-1810 these sections were brought into the Mutiny Act. See Vol. I. pp. 181-182.

<sup>3</sup> The same limit existed in 1749, but the Soldier could be imprisoned or whipped as a punishment.

18. WHENEVER Her Majesty shall intend that any sentence of penal<sup>1</sup> servitude heretofore or hereafter passed upon any offender by any court-martial shall be carried into execution for the term specified in such sentence or for any shorter term, or shall be graciously pleased to commute as aforesaid to penal servitude any sentence of death passed by any such court, the sentence, together with Her Majesty's pleasure thereupon, shall be notified in writing by the officer commanding in chief Her Majesty's army in Great Britain and Ireland, or by the adjutant-general, or by the Secretary of State for the War Department, to any judge of the Queen's Bench, Common Pleas, or Exchequer in England or Ireland, and thereupon such judge shall make an order for the penal servitude of such offender in conformity with such notification, and shall do all such other acts consequent upon such notification as such judge is authorised to do by any Act in force touching the penal servitude of other offenders; — and it shall be lawful for any judge of the Queen's Bench, Common Pleas, or Exchequer in Ireland to make an order that any such offender convicted in Ireland shall be kept in penal servitude in England; — and such order shall be in all respects as effectual in England as though such offender had been convicted in England, and the order had been made by any judge of the Queen's Bench, Common Pleas, or Exchequer in England; — and the person in whose custody such offender shall at that time be, and all other persons whatsoever whom the said order may concern, shall be bound to obey and shall be assistant in the execution thereof, and shall be liable to the same punishment for disobedience to or for interrupting the execution of such order as if the order had been made under the authority of any such Act as aforesaid; — and every person so ordered to be kept in penal servitude shall be subject to every provision made by law and in force concerning persons under sentence of penal servitude; — and from the time when such order of penal servitude shall be made every Act in force touching the escape of felons, or their afterwards returning or being at large without leave, shall apply to such offender, and to all persons aiding and abetting, contriving or assisting in any escape or intended escape or returning without leave of any such offender; — and the judge who shall make any order of penal servitude as aforesaid shall direct the notification of Her Majesty's pleasure, and his own order made thereupon, to be filed and kept of record in the office of the clerk of the Crown of the Court of Queen's Bench; —

As to execution of sentences of penal servitude in the United Kingdom.

<sup>1</sup> This section, as applicable to transportation, was inserted in 1803. See 43 Geo. III. c. 20, ss. 5-9; and 7 & 8 Geo. IV. c. 63.

and the said clerk shall have a fee of two shillings and sixpence only for filing the same, and shall, on application, deliver a certificate in writing (not taking more than two shillings and sixpence for the same) to such offender or to any person applying in his or Her Majesty's behalf, showing the christian and surname of such offender, his offence, the place where the court was held before which he was convicted, and the conditions on which the order of penal servitude was made; — which certificate shall be sufficient proof of the conviction and sentence of such offender, and also of the terms on which such order for his penal servitude was made, in any court and in any proceeding wherein it may be necessary to inquire into the same.

19. WHENEVER any sentence of penal servitude heretofore or hereafter passed upon any offender by any court-martial holden in any part of Her Majesty's foreign dominions, or elsewhere beyond the seas, is to be carried into execution for the term specified in such sentence or for any shorter term, or when sentence of death, passed by any such court-martial, has been or shall as aforesaid be commuted to penal servitude, the same shall be notified by the officer commanding Her Majesty's forces at the presidency or station where the offender may come or be, or in his absence by the adjutant-general for the time being, if in India, to the chief judge or any judge of the chief civil court of the presidency or province where the offender may come or be, and if in any other part of Her Majesty's dominions to the chief justice or some other judge therein, and such judge shall make order for the intermediate custody and penal servitude of such offender; and the offender shall, until handed over in pursuance of any such order to the civil authorities, be detained in military custody, and may be moved in such custody from place to place as circumstances may require; — and upon any such order being made it shall be duly notified to the governor of the presidency if in India, or to the governor of the colony if in any of Her Majesty's colonies, or to the person who shall for the time being be exercising the office of governor of such presidency or colony, who, on receipt of such notification, shall cause such offender to be removed or sent to some other colony or place, or to undergo his sentence within the presidency or colony where the offender was so sentenced, or where he may come or be as aforesaid, in obedience to the directions for the removal and treatment of convicts which shall from time to time be transmitted from Her Majesty through one of Her Principal Secretaries of State to such presidency or colony; — and such offender shall accordingly to such directions undergo the sentence of penal servitude

As to execution of sentences of penal servitude in the colonies, India, or elsewhere out of Her Majesty's dominions.

shall have been passed upon him either in the presidency or in which he has been so sentenced, or in the colony or place to which he has been so removed or sent,<sup>1</sup> and whilst such sentence remains in force shall be liable to be imprisoned, and kept to hard labour, and otherwise dealt with under such sentence in the same manner as if he had been sentenced to be imprisoned with hard labour, during the term of his penal servitude, by the judgment of a court of competent jurisdiction in such presidency or colony, or place to which he has been so removed or sent, or to which he may be ordered to be kept to hard labour: — AND elsewhere out of Her Majesty's dominions every commanding officer shall have power to make an order in relation to the penal servitude or intermediate custody of such offender; — and such offender shall be liable by virtue of such order to be imprisoned and kept to hard labour and otherwise dealt with under the sentence of the court in the same manner as if he had been sentenced to be imprisoned with hard labour during the term of his penal servitude by the judgment of a court of competent jurisdiction, in the place where he may be ordered to be kept to hard labour, or in the place to which he may be ordered to be removed for the purpose of undergoing his sentence of penal servitude. — <sup>2</sup>IF any prisoner shall be brought to any place in the United Kingdom, there to undergo any sentence of penal servitude which has been passed upon him by a court-martial elsewhere, and the judge's or officer's order hereinbefore made for his penal servitude and intermediate custody shall be forthwith produced, and the judge-advocate-general, upon application for that purpose, shall certify that it appears from the proceedings of the court-martial whereby the prisoner was sentenced that he has been duly sentenced to penal servitude, and that nothing appears to the contrary thereon such sentence is in force against the said prisoner for the period to be stated in the certificate, then it shall be lawful for one of Her Majesty's Secretaries of State, upon consideration of such certificate, to sign in writing under his hand that the said prisoner shall be removed to a convict prison, and be imprisoned and kept to hard labour according to the sentence stated in such certificate, and upon the prisoner shall be removed to such convict prison, he shall be liable to be imprisoned and kept to hard labour, and otherwise dealt with during the term of his sentence, as if he had been sentenced to a like term of penal servitude by a competent court in the United Kingdom.

section came under consideration in *Re Allen*, 3 Ell. and Ell. p. 356. If a man is sentenced there he must receive his punishment of imprisonment, and no other authority for his removal be given.

<sup>2</sup> Added in 1867

20. IN any case where a sentence of penal servitude shall have been awarded by a general or detachment general court-martial it shall be lawful for Her Majesty, or, if in any place out of the United Kingdom or British Isles, for the officer commanding in chief Her Majesty's forces there serving, instead of causing such sentence to be carried into execution,<sup>1</sup> to order that the offender be imprisoned, with or without hard labour, and with or without solitary confinement, for such term not exceeding two years as shall seem meet to Her Majesty, or to the officers commanding as aforesaid.

A sentence of penal servitude may be commuted for imprisonment, &c.

21. WHERE an award of any forfeiture, or of deprivation of pay, or of stoppages of pay, shall have been added to any sentence of penal servitude, it shall be lawful for Her Majesty,<sup>2</sup> or, if in any place out of the United Kingdom or British Isles, for the officer commanding in chief Her Majesty's forces there serving, in the event of the sentence being commuted for imprisonment, to order such award of forfeiture, deprivation of pay, or stoppages of pay to be enforced, mitigated, or remitted, as may be deemed expedient.

Of forfeitures, when combined with penal servitude.

22. NO court-martial<sup>3</sup> shall, for any offence whatever committed under this Act during the time of peace within the Queen's dominions, have power to sentence any soldier to corporal punishment; provided, that any court-martial may sentence any soldier to corporal punishment while on active service in the field, or on board any ship not in commission, for mutiny, insubordination, desertion, drunkenness on duty or on the line of march, disgraceful conduct, or any breach of the Articles of War; and no sentence of corporal punishment shall exceed fifty lashes.

Courts-martial may not sentence to corporal punishment in time of peace.

23. IT shall be lawful for any general, district, or garrison court-martial, in addition to any sentence of corporal punishment, to award imprisonment,<sup>4</sup> with or without hard labour, and with or without solitary confinement, such confinement not exceeding the periods prescribed by the Articles of War.

Power to inflict corporal punishment and imprisonment.

<sup>1</sup> See note on s. 16, *ante*.

<sup>2</sup> This duty would be within the legal competency of the Crown to discharge without statutory authority.

<sup>3</sup> This limitation applies to the power of a "Court-martial" only, and not to any power which other authorities may have over a prisoner under the Prison Act. It was inserted in 1868, and see 1867.

<sup>4</sup> This section was inserted in the Mutiny Act of 1825.

24. IN all cases in which corporal punishment shall form the whole or part of the sentence awarded by any court-martial it shall be lawful for Her Majesty, or for the general or other officer authorised to confirm the sentences of courts-martial, to commute<sup>1</sup> such corporal punishment to imprisonment for any period not exceeding forty-two days, with or without hard labour, and with or without solitary confinement, or to mitigate such sentence, or instead of such sentence, to award imprisonment for any period not exceeding twenty days, with or without hard labour, and with or without solitary confinement and corporal punishment, to be inflicted in the prison, not exceeding twenty-five lashes, and the solitary confinement hereinbefore mentioned shall in no case exceed seven days at a time, with intervals of not less than seven days between each period of such confinement.

Power to commute corporal punishment for imprisonment, &c.

25. IT shall be lawful for Her Majesty<sup>2</sup> in all cases whatsoever, instead of causing a sentence of cashiering to be put in execution, to order the offender to be reprimanded, or, in addition thereto, to suffer such loss of army or regimental rank, or both, as may be deemed expedient.

Power to commute a sentence of cashiering.

26. A GENERAL, garrison, or district court-martial may sentence any soldier to imprisonment, with or without hard labour, and with or without solitary confinement, but such solitary confinement shall not exceed the periods prescribed by the Articles of War.

Power of imprisonment by general, garrison, or district courts-martial.

27. ANY regimental or detachment court-martial may sentence any soldier to imprisonment, with or without hard labour, for any period not exceeding forty-two days, and with or without solitary confinement not exceeding the periods prescribed by the Articles of War.

Power of imprisonment by regimental or detachment courts-martial.

28. WHENEVER sentence shall be passed by a court-martial on an offender already under sentence either of imprisonment or of penal servitude, the court may award a sentence of imprisonment or penal servitude for the offence for which he is under trial, to commence at the expiration of the imprisonment or penal servitude to which he shall have been so previously sentenced, although the aggregate of the terms of imprisonment or penal servitude respectively may exceed the term

As to imprisonment of offenders already under sentence.

<sup>1</sup> See note on sec. 16, *ante*.

<sup>2</sup> It is difficult to reconcile this section (first inserted in 1860) with any legal principle under which the authority of the Crown over the Army is upheld. *Re Munsergh*, 1 B. and S. p. 400, and Vol. II. pp. 118-123.

for which any of those punishments could be otherwise awarded. —WHENEVER Her Majesty, or any general or other officer authorised to confirm the sentences of courts-martial, shall commute a sentence of penal servitude or corporal punishment to imprisonment, and the offender whose sentence shall be so commuted shall, at the time of such commutation, be under sentence of imprisonment or penal servitude, it shall be lawful for Her Majesty, or the general or other officer who shall so commute such sentence, to direct that such commuted sentence of imprisonment shall commence at the expiration of the imprisonment or penal servitude to which such prisoner shall have been so previously sentenced, although the aggregate of the term of imprisonment or penal servitude respectively may exceed the term for which any of those punishments could be otherwise awarded.

29. IT shall be lawful for the Secretary of State for the War Department, and in India for the Governor General in council, to set apart any buildings<sup>1</sup> now erected or which may hereafter be erected, or any part or parts thereof, as military prisons, and to declare that any building or any two or more buildings shall be, and thenceforth such building or buildings shall be deemed and taken to be, a military prison :— and every military prison which, under the provisions of any former Act of Parliament, has been or which shall be so as aforesaid set apart and declared, shall be deemed to be a public prison within the meaning of this Act ; —<sup>2</sup> and all and every the powers and authorities with respect to county gaols or houses of correction which now are or which may hereafter be vested in any of Her Majesty's Principal Secretaries of State shall, with respect to all such military prisons, belong to and may be exercised by the Secretary of State for the War Department, and in India by the Governor General in council ; — and it shall be lawful for the said Secretary of State, and in India for the Governor General in council, from time to time to make, alter, and repeal rules and regulations for the government and superintendence of any such military prison, and of the governor, provost marshal, officers, and servants thereof, and of the offenders confined therein, [<sup>3</sup> which said rules and regulations so made as aforesaid shall remain and continue to be in force until the same are altered or repealed by Her Majesty's said Secretary of State for War,] or in India by the Governor General in council ; — and it shall be lawful for the said Secretary of State, and in India for the

<sup>1</sup> This section was first inserted in 1844. See note "as to Military Prisons," Vol. I. p. 405. It was extended to India in 1868.

<sup>2</sup> Inserted in 1846.

<sup>3</sup> Inserted in 1867 to continue the rules in force without annual renewal.

Governor General in council, from time to time to appoint an inspector general and inspectors of military prisons, and a governor or provost marshal, and all other necessary officers and servants, for any such military prison, and, as occasion may arise, to remove the governor or provost marshal, officer, or servant of any such military prison; — and the general or other officer commanding any district or station within which may be any such military prison, or such general or other officer, and such other person or persons as the said Secretary of State, and in India the Governor General in council, may from time to time appoint, shall be a visitor or visitors of such prison; — and the said Secretary of State, and in India the Governor General in council, may authorise any general officer commanding to appoint periodically visitors to any military prison within his command; — and the said Secretary of State, and in India the Governor General in council, or the general officer so appointing, shall transmit to the visitor or visitors of every military prison established by his authority a copy of the rules and regulations which are to be observed and enforced, and the same shall accordingly be observed and enforced, within such prison; — and every inspector, visitor, and governor of any such military prison shall, subject to such rules and regulations as may from time to time be made by the said Secretary of State, or in India by the Governor General in council, have and exercise in respect of such prison, and of the governor, officers, and servants thereof, and of the prisoners confined therein, all the powers and authorities, as well in respect of administering oaths as otherwise, which any inspector, visiting justice, or governor of a county gaol or house of correction may respectively exercise as such: — PROVIDED that every inspector of such military prisons, who is also a director of convict prisons shall have the same power in such military prisons as he has in convict prisons.

30. EVERY governor, provost marshal, gaoler, or keeper of any public<sup>1</sup> prison or of any gaol or house of correction in any part of Her Majesty's dominions shall receive into his custody any military offender under sentence of imprisonment by a court martial, upon delivery to him of an order in writing in that behalf from the general commanding in chief, or the adjutant general, or the officer who confirmed the proceedings of the court, or the officer commanding the regiment or corps to which the offender belongs or is

As to the custody of military offenders under sentence of court-martial and in other cases.

<sup>1</sup> This and other sections were inserted in consequence of imprisonment being substituted for whipping, in 1812. See 52 Geo. III. c. 22, ss. 23-24.



attached, which order shall specify the offence of which he shall have been convicted, and the sentence of the court, and the period of imprisonment which he is to undergo [<sup>1</sup> and the day and hour of the day on which he is to be released]; — and such governor, provost marshal, gaoler, or keeper shall keep such offender in a proper place of confinement, with or without hard labour, and with or without solitary confinement, according to the sentence of the court, and during the time specified in the said order, or until he be discharged or delivered over to other custody before the expiration of that time under an order duly made for that purpose; — and whenever troops are called out in aid of the civil power, or are stationed in billets, or are on the line of march, every governor, provost marshal, gaoler, or keeper of any public prison, gaol, house of correction, lock-up house, or other place of confinement, shall receive into his custody any soldier for a period not exceeding seven days, upon delivery to him of an order in writing on that behalf from the officer commanding such troops.

31. IN the case of a prisoner undergoing imprisonment under the sentence of a court-martial in any public prison other than the military<sup>2</sup> prisons set apart by the authority of this Act, or in any gaol or house of correction in any part of the United Kingdom, it shall be lawful for the general commanding in chief, or the adjutant general, or the officer who confirmed the proceedings of the court, or the officer commanding the district or garrison in which such prisoner may be, to give, as often as occasion may arise, an order in writing directing that the prisoner be discharged, or be delivered over to military custody, whether for the purpose of being removed to some other prison or place in the United Kingdom, there to undergo the remainder or any part of his sentence, or for the purpose of being brought before a court-martial either as a witness or for trial; — and in the case of a prisoner undergoing imprisonment or penal servitude under the sentence of a court-martial in any public prison other than such military prison as aforesaid, or in any gaol or house of correction in any part of Her Majesty's dominions other than the United Kingdom, it shall be lawful for the general commanding in chief or the adjutant general of Her Majesty's forces in the case of any such prisoner, and for the Commander-in-Chief in India in the case of any prisoner so confined in any part of Her Majesty's Indian dominions, and for the general commanding in chief in any presidency in India in the case of a prisoner so therein confined,

As to the removal or discharge of prisoners in certain cases.

<sup>1</sup> Inserted in 1846.

<sup>2</sup> This was amended in 1861. *Re Allen*, 3 Ell. and Ell. p. 356.

and for the officer commanding in chief or the officer who confirmed the proceedings of the court at any foreign station in the case of a prisoner so there confined, to give, as often as occasion may arise, an order in writing directing that the prisoner be discharged or be delivered over to military custody, whether for the purpose of being removed to some other prison or place in any part of Her Majesty's dominions, there to undergo the remainder or any part of his sentence, or for the purpose of being brought before a court-martial either as a witness or for trial ; — and in the case of any prisoner who shall be removed by any such order from any such prison, gaol, or house of correction either within the United Kingdom or elsewhere to some other prison or place either in the United Kingdom or elsewhere, the officer who gave such order shall also give an order in writing directing the governor, provost marshal, gaoler, or keeper of such other prison or place to receive such prisoner into his custody, and specifying the offence of which such prisoner shall have been convicted, and the sentence of the court and the period of imprisonment which he is to undergo, and the day and the hour on which he is to be released ; — and such governor, provost marshal, gaoler, or keeper shall keep such offender in a proper place of confinement, with or without hard labour, and with or without solitary confinement, according to the sentence of the court, and during the time specified in the said order or until he be duly discharged or delivered over to other custody before the expiration of that time under an order duly made for that purpose ; — and in the case of a prisoner undergoing imprisonment or penal servitude under the sentence of a court-martial in any military prison in any part of Her Majesty's dominions, the Secretary of State for the War Department, or the general officer commanding the district or station in which the prison may be situated, shall have the like powers in regard to the discharge and delivery over of such prisoners to military custody as may be lawfully exercised by any of the military authorities above mentioned in respect of any prisoners undergoing confinement as aforesaid in any public prison other than a military prison, or in any gaol or house of correction in any part of Her Majesty's dominions ; — and such prisoner, in any of the cases herein-before mentioned, shall accordingly, on the production of any such order as is herein-before mentioned, be discharged or delivered over, as the case may be : — PROVIDED always, that the time during which any prisoner under sentence of imprisonment by a court-martial shall be detained in such military custody under such order as aforesaid shall be reckoned as imprisonment under the sentence for whatever purpose such detention shall take place ; — and such prisoner may during such time, either when on board

ship or otherwise, be subjected to such restraint as is necessary for his detention and removal.

32. THE gaoler or keeper of any public prison, gaol, house of correction, lock-up house, or other place of confinement in any part of Her Majesty's dominions, shall diet and supply every soldier imprisoned therein under the sentence of a court-martial or as a deserter with fuel and other necessities according to the regulations of such place of confinement, and shall receive on account of every soldier, out of the subsistence of such soldier, during the period of his imprisonment, in Great Britain and Ireland, one shilling per diem, and in other parts of Her Majesty's dominions sixpence per diem:—IN all cases where such soldier is sentenced to be discharged from the army on the completion of his term of imprisonment, the Secretary of State for the War Department may cause to be issued out of army votes, upon application in writing, signed by any justice<sup>1</sup> within whose jurisdiction such place of confinement shall be locally situated, together with a copy of the order of commitment, a further sum not exceeding sixpence per diem, and which said sum of one shilling or of sixpence, and the further sum, if any, as the case may be, shall be carried to the credit of the fund from which the expense of such place of confinement is defrayed. — A SENTENCE of imprisonment or of penal servitude passed either by a court-martial or by any court of criminal jurisdiction upon any person subject to this Act, shall be in no respect affected by such person ceasing to be subject to this Act by discharge or otherwise at any time:—PROVIDED that for each person so ceasing to be subject to this Act the Secretary of State for the War Department may cause to be issued out of army votes, upon application in writing, signed by any justice as aforesaid, together with a copy of the order of commitment, a sum not exceeding one shilling and sixpence per diem, which said sum shall be carried to the credit of the fund from which the expense of such place of confinement is defrayed.

<sup>2</sup> IN India the expenses incurred under the provisions of this section shall be paid in the same manner as the other expenses of such prison, or as may be provided by the laws or regulations to be made in that behalf.

33. EVERY gaoler or keeper of any public prison, gaol, house of

<sup>1</sup> This section is thought to be a County grievance. In February 1673-1674, the deduction was 4*d.*; on 1st September 1801, 9*d.*; on the 12th March 1822, 6*d.*; in 1860, 1*s.* The section has been discussed in Parliament at 22 H. D. (O.S.), pp. 29 and 144; *ib.* (3), p. 2369.

<sup>2</sup> Added in 1863.

correction, or other place of confinement, to whom any notice shall have been given, or who shall have reason to know or believe, that any person in his custody for any offence, civil or military, is a soldier liable to serve Her Majesty on the expiration of his imprisonment, shall forthwith,<sup>1</sup> or as soon as may be, give, if in Great Britain to the Secretary of State for the War Department, [<sup>2</sup>and if, in Ireland to the general commanding Her Majesty's forces in Ireland, or if in India to the adjutant general of the army, or to the nearest military authority with whom it may be convenient to communicate, notice of the day and hour on which the imprisonment of such person will expire; and every such gaoler or keeper is hereby required to use his best endeavours to ascertain and report in all cases where practicable the particular regiment or corps, battalion of a regiment or battery of artillery, to which such soldier belongs, and also whether he belongs to the depôt or the head quarters of his regiment; and in the event of his being a recruit who has not joined, that it may be so stated in his report, together with the name of the place where the man enlisted.] — IN all cases where the soldier in custody is under sentence to be discharged from the service on the completion of his term of imprisonment, and the discharge document is in the hands of the gaoler, such gaoler shall not be required to make any report thereof to the Secretary of State for War, or to the military authorities herein-before referred to.

Expiration of imprisonment of soldiers in common gaols.

34. UPON reasonable suspicion that a person is a deserter it shall be lawful for any constable,<sup>3</sup> or if no constable can be immediately met with, then for any officer or soldier in Her Majesty's service, or other person, to apprehend or cause to be apprehended such suspected person, and forthwith to bring him or cause him to be brought before any justice<sup>4</sup> living in or near the place where he was so apprehended and acting for the county, city, district, place, or borough wherein such place is situate or for the county adjoining such first-mentioned county or such borough; — and such justice is hereby authorised and required to inquire whether such suspected person<sup>5</sup> is a deserter,

Apprehension of deserters in the United Kingdom.

<sup>1</sup> First introduced by 52 Geo. III. c. 22, s. 92.

<sup>2</sup> Added in 1863.

<sup>3</sup> This is a very old section, and involves an important principle. See Chap. VIII. par. 8, Vol. II. pp. 17 and 47, and the case of *Wolton v. Gavin*, 16 Q. B. Rep. p. 90.

<sup>4</sup> This is for the protection of the accused. Any Justice could punish desertion wherever the offence was committed, according to 3 Cok. Inst. p. 86.

<sup>5</sup> This word formerly stood as "Soldier," which excluded an "Officer" from the operation of this section. See *Re Douglass*, 3 Q. B. Rep. p. 830. In the Mutiny Act, 1846, the word now found was inserted. See 9 Vic. c. 11, s. 22.

[<sup>1</sup> and from time to time to defer the said inquiry and to remand the said suspected person in the manner prescribed by an Act passed in the eleventh and twelfth years of the reign of Her present Majesty, chapter forty-two, section twenty-one, and subject to every provision therein contained]; and if it shall appear to the satisfaction of such justice, by the testimony of one or more witnesses taken upon oath, or by the confession of such suspected person, confirmed by some corroborative evidence upon oath or by the knowledge of such justice,<sup>2</sup> that such suspected person is a deserter, such justice shall forthwith cause him to be conveyed in civil custody<sup>3</sup> to the head quarters or depôt of the regiment or corps to which he belongs, if stationed within a convenient and easily accessible distance from the place of commitment, or if not so stationed then to the nearest or most convenient public prison (other than a military prison set apart under the authority of this Act) or police station legally provided as a lock-up house for temporary confinement of persons taken into custody, whether such prison or police station be in the county or borough in which such suspected person was apprehended or in which he was committed, or not; — or if the deserter has been apprehended by a party of soldiers of his own regiment or corps in charge of a commissioned officer, such justice may deliver him up to such party, unless the officer shall deem it necessary to have the deserter committed to prison for safe custody; — and such justice shall transmit an account of the proceedings, in the form prescribed in the schedule annexed to this Act, to the Secretary of State for the War Department, specifying therein whether such deserter was delivered to his regiment or corps, or to the party of his regiment or corps, in order to his being taken to the head quarters or depôt of his regiment or corps, or whether such deserter was committed to prison, to the end that the person so committed may be removed by an order from the office of the said Secretary of State, and proceeded against according to law; — and such justice shall also send to the said Secretary of State a report stating the names of the persons by whom or by or through whose means the deserter was apprehended and secured; — and the said Secretary of State shall transmit to such justice an order for the payment to such persons of such sum not exceeding forty<sup>4</sup> shillings as the said Secretary of State shall be satisfied they are entitled to according to

<sup>1</sup> Inserted in 1859.

<sup>2</sup> Sec. 46 of 1849.

<sup>3</sup> At the expense of the County. See *King v. Pearce*, 3 M. and Sel. p. 63, and 14 Parl. Hist. pp. 453-454.

<sup>4</sup> 20s. in 1812 but raised to 40s. by Order of 8 June 1812. Compare Section 117 of *Mutiny Act*, 1822, with 116 of 1823.

the true intent and meaning of this Act; — and for such information, commitment, and report as aforesaid the clerk of the said justice shall be entitled to a fee of two shillings and no more; — and every gaoler and other person into whose custody any person charged with desertion is committed shall immediately upon the receipt of the person so charged into his custody pay such fee of two shillings, shall notify the fact to the Secretary of State for the War Department, and transmit also to the said Secretary of State a copy of the commitment, to the end that such Secretary of State may order repayment of such fees; — and when any such person shall be apprehended and committed as a deserter in any part of Her Majesty's foreign dominions <sup>In Her Majesty's foreign dominions.</sup> the justice shall forthwith cause him to be conveyed to some public prison, if the regiment or corps to which he is suspected to belong shall not be in such part, or, if the regiment or corps be in such part, the justice may deliver him into custody at the nearest military post if within reasonable distance, although the regiment to which such person is suspected to belong may not be stationed at such military post; — and such justice shall in every case transmit to the general or other officer commanding a descriptive return in the form prescribed in the schedule to this Act annexed, to the end that such person may be removed by order of such officer, and proceeded against according to law; — [and such descriptive return, purporting to be duly made and subscribed in accordance with the Act, shall, in the absence of proof to the contrary, be deemed sufficient evidence of the facts and matters therein stated: — PROVIDED always that any such person so committed as a deserter in any part of Her Majesty's dominions <sup>Transfer of deserters.</sup> shall, subject to the provisions herein-after contained, be liable to be transferred by order of the general or other officer commanding to serve in any regiment or corps or depôt nearest to the place where he shall have been apprehended, or to any other regiment or corps to which it may be desirable that he should be transferred, and shall also be liable after such transfer of service to be tried and punished as a deserter.]

35. EVERY <sup>2</sup> gaoler or keeper of any public prison, gaol, house of correction, lock-up house, or other place of confinement in any part of Her Majesty's dominions, is hereby required to receive and confine therein every deserter who shall be delivered into his custody by any soldier or other person <sup>As to the temporary custody of deserters in gaols.</sup>

<sup>1</sup> Added in 1863.<sup>2</sup> Amended in 1809.

conveying such deserter under lawful authority, on production of the warrant of the justice of the peace on which such deserter shall have been taken, or some order from the office of the Secretary of State for the War Department, which order shall continue in force until the deserter shall have arrived at his destination; and such gaoler or keeper shall be entitled to one shilling for the safe custody of the said deserter while halted on the march, and to such subsistence for his maintenance as shall be directed by Her Majesty's regulations.

36. ANY recruit for Her Majesty's army who, having been attested or received pay other than enlisting money, shall desert before joining the regiment or corps for which he has enlisted, shall, on being apprehended, and committed for such desertion by any justice of the peace upon the testimony of one or more witnesses upon oath, or upon his own confession, forfeit his personal bounty, and be liable to be transferred to any regiment or corps or depôt nearest to the place where he shall have been apprehended, or to any other regiment or corps to which Her Majesty may deem it more desirable that he should be transferred: — PROVIDED always, that such deserters thus transferred shall not be liable to other punishment for the offence, or to any other penalty except the forfeiture of their personal bounty.

37. ANY person who shall confess<sup>1</sup> himself to be a deserter from Her Majesty's forces, or from the embodied militia, shall be liable to be taken before any two justices of the peace acting for the county, district, city, burgh, or place where any such person shall at any time happen to be when he shall be brought before them, and on proof that any such confession as aforesaid was false, shall by the said justices be adjudged to be punished, if in England as a rogue and vagabond, and if elsewhere by commitment to some prison or house of correction, there to be kept to hard labour for any time not exceeding three calendar months; — and if, when such person shall be brought before the said justices, it shall be proved to their satisfaction that such confession has been made, but evidence of the truth or falsehood of such confession shall not at that time be forthcoming, such justices within the United Kingdom are hereby required to remand such person in the manner herein-before mentioned, and to transmit a statement

<sup>1</sup> The section prior to 1861 made this confession before a Justice equivalent to enlistment. Now the punishment of fraud is summary, and equal to that which the Law imposes on a cheat. See Law Officers' Opinion of March 1787.

of the case and descriptive return to the Secretary of State for the War Department, with a request to be informed whether such person appears to belong or to have belonged to the regiment or corps from which he shall have so confessed himself to have deserted; — and a letter from the War Office in reply thereto, referring to such statement, and purporting to be signed by or on behalf of the Secretary of State for the War Department, shall be admissible in evidence against such person, and shall be deemed to be legal evidence of the facts stated therein, and on the receipt thereof the said justices shall forthwith proceed to adjudicate upon the case. — IN India the authority herein given to two justices may be exercised by one European justice or magistrate.

38. WHEN there shall not be any military officer of rank not inferior to captain, or any adjutant of regular militia, within convenient distance of the place where any non-commissioned officer or soldier on furlough shall be Furlough in case of sickness. detained by sickness or other casualty rendering necessary any extension of such furlough, it shall be lawful for any justice<sup>1</sup> who shall be satisfied of such necessity to grant an extension of furlough for a period not exceeding one month; — and the said justice shall by letter immediately certify such extension and the cause thereof to the commanding officer of the corps or detachment to which such non-commissioned officer or soldier belongs, if known, and if not then to the agent of the regiment or corps, in order that the proper sum may be remitted to such non-commissioned officer or soldier, who shall not during the period of such extension of furlough be liable to be treated as a deserter; — PROVIDED always, that nothing herein contained shall be construed to exempt any soldier from trial and punishment, according to the provisions of this Act, for any false representation made by him in that behalf to the said justice, or for any breach of discipline committed by him in applying for and obtaining the said extension of furlough.

39. NO person subject to this Act, having been acquitted or convicted of any crime or offence by the civil<sup>2</sup> magistrate, or by the verdict of a jury, shall be liable to be again convicted for the same crime or offence by a court-martial, or to be punished for the

<sup>1</sup> Previous Acts are 39 & 40 Geo. III. c. 27, s. 62 (which originated this power in 1800), 54 Geo. III. c. 25, s. 117, 57 Geo. III. c. 12, ss. 119, 120. In 1809 a section was added, directing Relief to be made out of the Poor Rates.— 49 Geo. III. c. 12, s. 96.

<sup>2</sup> This section has been fully adverted to in Chap. VII. par. 38, and in Vol. I. pp. 54, 144-147, 159, 206-215, 362, 449-451.



same otherwise than by cashiering in the case of a commissioned officer, or in the case of a warrant officer by reduction to an inferior class or to the rank of a private soldier by order of the Commander-in-Chief, or in the case of an army schoolmaster to discharge from the service, or loss of the whole or any period of his previous service reckoning towards pension on discharge by order of the Commander-in-Chief, or in the case of a non-commissioned officer by reduction to the ranks by order of the Commander-in-Chief or of the colonel, or in the militia by order of the appointed commandant of the regiment or corps; — and whenever any officer or soldier shall have been tried by any court of ordinary criminal jurisdiction, the clerk of such court or other officer having the custody of the records of such court, or the deputy of such clerk, shall, if required by the officer commanding the regiment or corps to which such officer or soldier shall belong, transmit to him a certificate, setting forth the offence of which the prisoner was convicted, together with the judgment of the court thereon if such officer or soldier shall have been convicted, or of the acquittal of such officer or soldier, and shall be allowed for such certificate a fee of three shillings.

40. ANY person<sup>1</sup> attested for Her Majesty's army, or serving on the permanent staff of the disembodied<sup>2</sup> militia or volunteers other than as a commissioned officer, shall be liable to be taken out of Her Majesty's service only by process<sup>3</sup> or execution on account of any charge of felony or of misdemeanor, or of any crime or offence other than the misdemeanor of absenting himself from his service, or neglecting to fulfil his contract, or otherwise misconducting himself respecting the same, or the misdemeanor of refusing to comply with an order of justices for the payment of money,<sup>4</sup> or on account of an original debt proved by affidavit of the plaintiff or of some one on his behalf to amount to the value of thirty<sup>5</sup> pounds at the least, over and above all costs of suit, such affidavit to be sworn, without payment of any fee, before some judge of the court out of which process or execution shall issue, or

<sup>1</sup> This includes Non-commissioned Officers. *Lloyd v. Woodhall*, 1 Will. p. 216, and 1 Bla. Rep. p. 29. Chap. VII. par. 25.

<sup>2</sup> These are specified, or they would not otherwise be entitled to the benefits of the Act. *Rickman v. Studwick*, 8 East. Rep. p. 105. <sup>3</sup> Sec. 52 of 1849.

<sup>4</sup> An order for maintenance of an illegitimate child is a Criminal matter. *Reg. v. Ferrall*, 15 Jur. p. 42; 2 D. C. C. p. 56; of a legitimate one, 3 Arch. J. of P. p. 283. <sup>5</sup> As to the gradual increase of debt, Vol. I. pp. 207, 211.

ome person authorised to take affidavits in such court, of affidavit, when duly filed in such court, a memorandum without fee, be endorsed upon the back of such process, the facts sworn to, and the day of filing such affidavit; — soldier or other person as aforesaid shall be liable process whatever to appear before any justice of the peace or other authority whatever, or to be taken out of Her Majesty's service by any writ, summons, warrant, judgment, execution, or any process whatsoever by or by the authority of any court of law, or any justice of the peace, or any other authority whatsoever, for any original debt not amounting to more than five pounds, [or for not supporting or maintaining, or for not supported or maintained, or for leaving or having left a wife or child to any parish, township, or place, or to the common law, or any union, any relation or child which such soldier or other person might, if not in Her Majesty's service, be compellable by law to relieve or maintain, or for neglecting to pay to the mother of any bastard<sup>1</sup> child, or to any person who may have been entrusted with the custody of such child, any sum to be paid in pursuance of an order on that behalf,] or for the breach of any contract, covenant, agreement, or other engagement whatever, by or by the authority of any court of law, or by or by the authority of any justice of the peace, or by or by the authority of any other authority whatsoever, in writing, or for having left or deserted his employer or his master, or for his contract, work, or labour, or misconducting himself in the same, except in the case of an apprentice, or of an indentured labourer, as herein-after described; and all summonses, writs, commitments, indictments, convictions, judgments, and orders, on account of any of the matters for which it is herein provided that a soldier or other person as aforesaid is not liable to be taken out of Her Majesty's service, shall be utterly illegal, and void, to all intents and purposes; — and any judge of any court may examine into any complaint made by a soldier or other person against any superior officer, and by warrant under his hand discharge any soldier, without fee, he being shown to have been arrested by or by the authority of any court of law, or by or by the authority of any justice of the peace, or by or by the authority of any other authority whatsoever, to the intent of this Act, and shall award reasonable costs to the complainant, who shall have for the recovery thereof the same remedy as would have been applicable to the recovery of any debt which might have been awarded against the complainant in judgment or execution as aforesaid, or a writ of Habeas corpus ad faciendum shall be awarded or issued, and the discharge of

Soldiers not liable to be taken out of Her Majesty's service for debts under 3*l.*, or for not maintaining their families, or for breach of contract.

<sup>1</sup> Where this exemption was inserted. See *Rex v. Archer*, 2 Te. Rep. p. 270; 5 Te. Rep. p. 156. This section has been amended on various occasions, and in 1873 the words between brackets were omitted.

any such soldier out of custody shall be ordered thereupon; — PROVIDED that any plaintiff, upon notice of the cause of action first given in writing to any soldier, or left at his last quarters, may proceed in any action or suit to judgment, and have execution other than against the body or military necessities or equipments of such soldier: — PROVIDED also, that nothing herein contained relating to the leaving or deserting a master or employer, or to the breach of any contract, agreement, or engagement, shall apply to persons who shall be really and bonâ fide apprentices, duly bound, under the age of twenty-one years, or to indentured labourers, as herein-after prescribed.

41.<sup>1</sup> NO person who shall be commissioned and in full pay as an Officers not to be sheriffs or mayors, &c. officer shall be capable of being nominated or elected to be sheriff of any county, borough, or other place, or to be mayor, portreeve, alderman, or to hold any office in any municipal corporation in any city, borough, or place in Great Britain or Ireland: — PROVIDED that the competence or liability of any officer to be nominated to or to hold any of the aforesaid offices shall not be deemed to be affected by reason of the corps to which he belongs being assembled for annual<sup>2</sup> training at the time of his nomination to, or during the period of his tenure of, such office.

48. ANY person who shall have been attested or enrolled in the Attested recruits triable in some cases either before two justices or before a court-martial. regular army or reserves, and who shall afterwards be discovered to have given any wilfully false answer to any question directed to be put by the proper authorities, or shall have made any wilfully false statement in the declaration herein-before mentioned, shall be liable, at the discretion of the proper military authorities, to be proceeded against before two justices in the manner herein-before mentioned, and by them sentenced accordingly, or to be tried by a district or garrison court-martial for the same, and punished in such manner as such court shall direct; — and the declaration made by such person on his attestation or enrolment purporting to be made in accordance with the regulations of the Secretary of State shall, in the absence of proof to the contrary, be deemed sufficient evidence, whether before such justice or justices or before any court-martial, of such person having represented the several particulars as stated in such declaration.

<sup>1</sup> First inserted in 1847. See Mutiny Act, sec. 54. The Municipal Corporations Act (5 & 6 Will. IV. c. 76, sec. 51) exempts any Military, Naval, or Marine Officer on full pay from municipal office.

<sup>2</sup> Proviso added in 1872. Militia Officers were formerly exempted from the office of Sheriff, by 42 Geo. III. c. 90, but not so now. See 2 & 3 Vic. c. 59.

Any man while belonging to a militia regiment shall enlist  
 be attested for Her Majesty's army, he shall be  
 o be tried before a court-martial on a charge for  
 n; — but it shall be lawful for the Secretary of As to  
militiamen  
enlisting  
into regular  
forces.  
 or the War Department [<sup>1</sup> to give such general  
 ns as may from time to time appear to him necessary for  
 any man who confesses himself to be a militiaman under  
 e of one penny a day of his pay for eighteen calendar  
 , in lieu of his being tried by court-martial; — and in  
 h militiaman shall have belonged to the Militia Reserve at  
 e of his attestation for placing him under a further stoppage  
 penny a day for two hundred and forty days; — and  
 to give general directions as to the manner in which such  
 es shall be applied, and whether, on making good the same,  
 shall be returned to his militia regiment, or be deemed to  
 dier, in the same manner as] if he had not been a militiaman  
 ime of his attestation: — [<sup>2</sup>PROVIDED that every soldier  
 ile belonging to a militia regiment enlisted in Her Majesty's  
 whether such enlistment took place before or after the  
 of the Mutiny Act, 1860, shall reckon service towards  
 formance of his limited engagement from the date of his  
 ion: — PROVIDED also, that any such soldier shall not  
 service for pension until the day on which his engagement  
 militia would have expired; — but if any such soldier  
 bsequently to his enlistment have rendered long, faithful,  
 unt service, the Secretary of State for War may, upon the  
 recommendation of the Commander-in-Chief, order that  
 reckon service for pension from the date of his attestation.]  
 F any non-commissioned officer of the volunteer permanent  
 lists in Her Majesty's army he may be tried and punished as  
 er, but if he confesses his desertion the Secretary of State  
 War Department, instead of causing him to be tried and  
 d as a deserter, may cause him to be returned to his service  
 volunteer permanent staff, to be there put under stoppages  
 s pay until he has repaid the amount of any bounty received  
 and the expenses attending his enlistment, and also the  
 f any arms, &c., issued to him while on the volunteer per-  
 staff, and not duly delivered up by him; or may cause him  
 ld to his service in Her Majesty's army, with a direction, if  
 fit, that his time of service therein shall not be reckoned  
 sion until the time when his engagement on the volunteer  
 ent staff would have expired; and may further cause him to

ated in 1866.

<sup>2</sup> Inserted in 1867.

<sup>1</sup> Added in 1865.

be put under stoppages of one penny a day of his pay until he has repaid the expense attending his engagement or attestation on the volunteer permanent staff, and also the value of any arms, clothing, or appointments issued to him while on the volunteer permanent staff, and not duly delivered up by him.

51. EVERY person subject to this Act who shall wilfully act contrary to any of its provisions in any matter relating to the enlisting or attesting of recruits for Her Majesty's army shall be liable to be tried for such offence before a general, district, or garrison court-martial, and to be sentenced to such punishments other than death or penal servitude as such courts may award.

Punishment  
of persons  
offending  
against laws  
relating to  
enlistment.

67. All powers and provisions relating to Soldiers shall be construed to extend to Non-Commissioned Officers, unless where otherwise provided.

Interpreta-  
tion.

76. NOTHING in this Act contained shall be construed to extend to exempt<sup>1</sup> any officer or soldier from being proceeded against by the ordinary course of law, when accused of felony, or of misdemeanor, or of any crime or offence other than the misdemeanors and offences herein-before mentioned; — and if any commanding officer shall neglect or refuse, on application being made to him for that purpose, to deliver over to the civil magistrate any officer or soldier under his command, or shall wilfully obstruct, neglect, or refuse to assist the officers of justice in apprehending any officer or soldier under his command, so accused as aforesaid, such commanding officer shall, upon conviction thereof in any of Her Majesty's Superior Courts at Westminster, Dublin, or Edinburgh, or in any court of record in India, be deemed to be thereupon cashiered, and shall be thenceforth utterly disabled to have or hold any civil or military office or employment in the United Kingdom of Great Britain and Ireland or in Her Majesty's service; — and a certificate of such conviction, containing the substance and effect of the indictment only, omitting the formal part, with the copy of the entry of the judgment of the court thereon, shall be transmitted to the Judge Advocate General in London.

Ordinary  
course of  
criminal  
justice not  
to be inter-  
fered with.

Punishment  
of officers  
obstructing  
civil justice.

89. ANY action<sup>2</sup> which shall be brought against any person for

<sup>1</sup> The history of this section has been given in Chap. VII. par. 37. See also 96th Article of War, and note thereon, *post*.

<sup>2</sup> I have already remarked upon this section in Chap. III., *ante*. A section of this kind is to be found in 1 Anne, sess. 2, c. 20, s. 52, and in the third *Mutiny*

to be done in pursuance of this<sup>1</sup> Act shall be brought  
 six<sup>2</sup> calendar months after the doing thereof,  
 shall be lawful for every such person to plead <sup>Form of</sup>  
 to the general issue<sup>3</sup> Not Guilty, and to give all <sup>actions at</sup>  
<sup>law.</sup>  
 matter in evidence to the jury; — and if the verdict shall  
 be defendant in any such action, or the plaintiff therein  
 nonsuited, or suffer any discontinuance thereof, or if in  
 such court shall see fit to assoilzie the defendant or dismiss  
 plaint, the court in which the said matter shall be tried  
 now unto the defendant treble costs, for which the said  
 t shall have the like remedy as in other cases where costs  
 w given to defendants; — and every action against any  
 r anything done in pursuance of this Act, or against any  
 or minister of a court-martial in respect of any sentence  
 court, or of anything done by virtue or in pursuance of such  
 , shall be brought in some one of the courts of record at  
 aster, or in Dublin, or in India, or in the Court of Session  
 nd, and in no other court whatsoever.

LL oaths and declarations which are authorised and re-  
 y this Act may be administered (unless where <sup>Administra-</sup>  
 e provided) by any justice of the peace, or other <sup>tion of oaths.</sup>  
 aving authority to administer oaths and declarations; —  
 person taking a false oath or declaration where <sup>Perjury.</sup>  
 or declaration is authorised or required by this  
 l be deemed guilty of wilful and corrupt perjury,<sup>4</sup> or of  
 making a false declaration, and being thereof duly con-  
 nall be liable to such pains and penalties as by law any  
 onvicted of wilful and corrupt perjury is subject and liable  
 and every commissioned officer convicted before a general  
 rtial of perjury, or of wilfully making a false declaration,  
 cashiered, and every soldier or other person amenable to  
 isions of this Act found guilty thereof by a general, district,  
 on court-martial shall be punished at the discretion of such

o. I. c. 34. It was omitted for some years, and reinserted in 1797 by  
 I. c. 33, s. 80.

honestly done, though under mistake. Malicious acts would not come  
 meaning of the Act. See *Keighley v. Bell*, 4 Fos. and Fin. pp. 798-800,  
*ins v. Rokeby*, *ib.* p. 825.

section does not expire with the Act. See *Wolton v. Gavin*, 16 Q. B.  
 , note. It was first inserted in 41 Geo. III. c. 11, s. 86.

defence under Statute of 21 James I. c. 4 is open under this.  
*v. Rokeby*, *sup.* 825.

was first introduced by 49 Geo. III. c. 12, s. 118. See the prior  
*Law Officers' Opinion*, Vol. I. pp. 169, and 522-523; also *Reg. v. Heune*,  
 1 Sm. p. 958, and 10 Jur. (N. S.) p. 724. Chap. IX. par. 51.

court. — [<sup>1</sup>IN India, in all cases where any oath is hereby required to be taken, or any person is hereby required to be sworn, a solemn declaration or affirmation may be substituted, if by the laws for the time being in force in India such declaration or affirmation would be allowed to be substituted in the place of an oath, in case the party were about to depose as a witness in a civil action in any of the supreme courts at the Presidencies; and any person wilfully and knowingly giving false testimony on oath or solemn declaration or affirmation in any case wherein such oath or solemn declaration or affirmation shall have been made for the purpose of this Act, or any proceedings under this Act, shall be deemed guilty of wilful and corrupt perjury, and, being duly convicted thereof before a court-martial or otherwise, shall be liable to such pains and penalties as by any law in force in England, or by any law in force in India, any persons convicted of wilful and corrupt perjury are subject and liable to.]

97. ALL crimes and offences which have been committed against any <sup>2</sup> former Act for punishing mutiny and desertion, and for the better payment of the army and their quarters, or against any Act for punishing mutiny and desertion of officers and soldiers in the service of the East India Company, or against any of the Articles of War made and established by virtue of either of the same, may, during the continuance of this Act, be tried and punished in like manner as if they had been committed against this Act; — and every warrant for holding any court-martial under any such former Act shall remain in full force, and all proceedings of courts-martial convened and held under any such warrant shall be continued, notwithstanding the expiration of such Act: — PROVIDED always, that no person shall be liable to be tried or punished for any offence against any of the said Acts or Articles of War which shall appear to have been committed more than three <sup>3</sup> years before the date of the warrant for such trial, unless the person accused, by reason of his having absented himself, or of some other manifest impediment, shall not have been amenable to justice within that period, in which

Offences  
against former  
Mutiny  
Acts and  
Articles of  
War.

<sup>1</sup> Added in 1863.

<sup>2</sup> A section somewhat similar to this is found in 3 & 4 Anne, c. 5, s. 52. In 1718 the Act was said to apply to all crimes committed against a former Act. See Vol. I. p. 508; and Chap. VII. par. 45. This section was inserted in 11 Geo. II. c. 2 (1737).

<sup>3</sup> Limitation was first inserted in 1 Geo. III. c. 6, s. 71, but desertion was excepted in the following year, by 2 Geo. III. c. 4, s. 72. In 1811, one year was proposed as the limitation. See 19 H. D. (O. S.), p. 368. As to the effect of this Limitation on the Jurisdiction of the Court, Chap. VII. par. 28.

case such person shall be liable to be tried at any time not exceeding two years after the impediment shall have ceased.

98. It should be the duty of all Officers and Soldiers to observe and conform to the provisions contained in "The Regimental Debts Act, 1863," and in the regulations for the better execution of the purposes of the said Act prescribed from time to time by Warrant under the Royal Sign Manual.<sup>1</sup>

Regimental  
Debts Act,  
1863.

99. IN all places in India where any body of Her Majesty's forces may be serving situate beyond the jurisdiction of any court of small causes established by or under the authority of the Governor General of India in Council, actions of debt, and all personal actions against officers or against persons licensed to act as sutlers, or other persons amenable to the provisions of this Act not being soldiers, shall be cognizable before a court of requests composed of military officers, and not elsewhere, provided the value in question shall not exceed four hundred rupees, and that the defendant was a person of the above description when the cause of action arose, which court the commanding officer of any camp, garrison, cantonment, or military post is hereby authorised and empowered to convene.<sup>2</sup> — WHENEVER owing to paucity of officers, or to any other cause, a court of requests cannot conveniently be held at the station where the defendant or defendants may be, it shall be lawful for the officer commanding the division or district to authorise the assembly of a court by the officer commanding at the nearest place where such court can be formed. — COURTS of requests shall in all practicable cases consist of five commissioned officers, and in no instance of less than three, and the president thereof shall in all practicable cases be a field officer, and in no case be under the rank of a captain, and every member shall have served five years as a commissioned officer; — and the president and members assisting at any such court, before any proceedings be had before it, shall take the following oath, which oath shall be administered by the president of the court to the other members thereof, and to the president by any member having first taken the oath; (that is to say,)

Where troops are serving beyond the jurisdiction of the courts of requests, &c., actions of debt not exceeding 400 rupees to be cognizable by a military court.

" I, swear, that I will duly administer justice according to the evidence in the matters that shall be brought before me.

" So help me GOD."

<sup>1</sup> Chap. IX. par. 25.

<sup>2</sup> Chap. VII. par. 44. Inserted in 1863, and amended in 1869.



And all witnesses before any such court shall be examined in the same manner as in the case of a trial by courts-martial. — All actions of debt and personal actions against persons amenable to this Act within the jurisdiction of any court of small causes shall be cognizable by such court to the extent of its powers; and all such actions where the amount sued for exceeds four hundred rupees shall be cognizable by a civil court or court of small causes only; and it shall be competent for any civil court or court of small causes, or for any military court of requests held in lieu thereof under the authority of this section, upon finding or awarding any debt or damage, either to award execution thereof generally, or to direct specially that the whole or any part thereof shall be stopped and paid over to the plaintiff out of any part not exceeding one half of any pay<sup>1</sup> or allowance, or out of any other public money which may respectively be coming to the defendant in the current or any future month or months, or to direct the same to be so paid by instalments. — In regard to awards of execution general civil courts and courts of small causes shall proceed in accordance with the rules of procedure for such courts in India; — and in all cases where execution shall be awarded generally by a military court of requests, the debt, if not paid forthwith, shall be levied by seizure and public sale of such of the defendant's goods and property as may be found within the camp, garrison, cantonment, or military post, under a written order of the commanding officer, grounded on the judgment of the court; — and all orders of such commanding officer as to the manner of such sale, or the person by whom the same shall be made, or otherwise respecting the same, shall be valid and binding; — and any goods and property of the defendant found within the limits of the camp, garrison, cantonment, or military post to which the defendant shall belong at any subsequent time shall be liable to be seized and sold in like manner in satisfaction of any remainder of such debt or damages; — and if any question shall arise whether any such effects or property are liable to be taken in execution as aforesaid, the decision and order of the said commanding officer shall be final and conclusive with respect to the same, and if sufficient goods shall not be found within the limits of the camp, garrison, cantonment, or military post, then any public money or any part not exceeding one-half of the pay or allowances accruing to the defendant shall be stopped in liquidation of such debt or damages; — and if such defendant shall not receive pay as an officer or from any public department, but be a

<sup>1</sup> This order cannot be made against the Crown or operate on half, or pay, beyond the control of the local authorities in India.

sutler, servant, or follower, he may be arrested by like order of the commanding officer, and imprisoned in some convenient place within the military boundaries for any period not exceeding two months, unless the debt be sooner paid; — and the said commanding officer shall not, nor shall any person acting on his orders in respect of the matters aforesaid, incur any liability to any person or persons whomsoever for any act done by him in pursuance of the provisions aforesaid; — and in cases where the said court shall direct specially that the whole or any part of the debt or damages shall be stopped and paid out of part of any pay and allowances, or out of any public money, the same shall be stopped and paid accordingly in conformity with direction; — PROVIDED always, that nothing hereinbefore contained shall enable any such action as aforesaid to be brought in a military court of requests by any officer or soldier against any officer: — PROVIDED also, that the articles of military equipment of any defendant shall not be deemed “goods and property” under this section.

100. <sup>1</sup> THE government of any of the presidencies in India may suspend the proceedings of any court-martial held in India on any officer or soldier belonging to Her Majesty's Indian forces within such presidencies respectively; — <sup>Provisions relating to courts-martial on officers and soldiers of Her Majesty's Indian forces.</sup> <sup>2</sup> and if any officer belonging to Her Majesty's Indian forces shall think himself wronged by the officer commanding the regiment, and shall upon due application made to him not receive the redress to which he may consider himself entitled, he may complain to his commander-in-chief in order to obtain justice, who is hereby required to examine into such complaint, and thereupon, either by himself or by his adjutant-general, to make his report to the government of the presidency to which such officer belongs, in order to receive the further directions of such government.

101. <sup>3</sup> ANY officer or soldier, or other person subject to this Act who shall be serving in the territories of any foreign state in India, or in any country in India under the protection of Her Majesty, or at any place in Her Majesty's dominions in India (other than Prince of Wales Island, Singapore, or Malacca), at a distance of upwards of one hundred and twenty miles from the presidencies of Fort William, Fort Saint <sup>As to trial of officers and soldiers serving in India.</sup>

<sup>1</sup> Chap. IX. par. 46.

<sup>2</sup> These are proceedings in analogy to those provided for by the 12th and 13th Articles of War, 1872.

<sup>3</sup> Chap. VII. par. 39; Chap. X. pars. 28 and 29. Inserted in Articles of 1842, and amended in 1856, placed in Mutiny Act in 1864, and amended

George, and Bombay respectively, and who shall be accused of having committed any offence which if committed in England would be punishable by the criminal law there, may,<sup>1</sup> if the same be also punishable under the Indian penal code for the time being, be tried by a general court-martial to be appointed by the general or other officer commanding in chief in such place for the time being, and, if found guilty, shall be liable to be sentenced by such court-martial to suffer such punishment as may legally be awarded by any of Her Majesty's courts of criminal jurisdiction within Her Majesty's dominions of India in respect of a like offence committed within the jurisdiction of such last-mentioned court; — but no sentence of a general court-martial for any such offence shall be carried into execution until the same shall have been duly confirmed; — and it shall be lawful for such general or other officer commanding in chief as aforesaid to confirm the sentence of any such general court-martial; — and such general or other officer as aforesaid may, if he shall think fit, suspend, mitigate, or remit the sentence; — or, in the case of a sentence of penal servitude, may commute the same to imprisonment, with or without hard labour, for such period as to him shall seem fit: — PROVIDED always, that in all cases wherein a sentence of death or penal servitude shall have been awarded by any such general court-martial held for the trial of a commissioned officer, or where a sentence of death shall have been awarded by any such general court-martial held for the trial of any person subject to this Act other than a commissioned officer, such sentence shall not be carried into execution until it shall have been duly approved by the Governor General in Council, or Governor in Council of the presidency in the territories subordinate to which the offender shall have been tried:<sup>2</sup> — PROVIDED also, that any person who may have been so tried as aforesaid shall not be tried for the same offence by any other court whatsoever.

103. Commander-in-Chief shall include the Field Marshal or  
Definition of  
 Commander-  
 in-Chief. other Officer Commanding in Chief Her Majesty's Forces  
 for the time being.<sup>3</sup>

104. Corps shall in this Act and in the Army Enlistment Act, 1870, as to future enlistments, include a Brigade constituted of two or more Regiments associated by G. O.<sup>4</sup> or Royal Warrant for the purposes of enlistment or service.

<sup>1</sup> In India this word is construed as permissive, not obligatory. 7438. The  
 "Indian Evidence Act" would apply to these proceedings. 476.

<sup>2</sup> See Art. 102 of 1844.

<sup>3</sup> Inserted in 1869.

<sup>4</sup> No. 8 of 1873.

105. HER Majesty may, by order of one of her Principal Secretaries of State, and subject to such conditions as may be determined by him, attach to any corps of the army in the United Kingdom any regiment or regiments of militia, and the officers, non-commissioned officers, and men (including the permanent staff) of any such regiment or regiments so attached shall be deemed for all purposes to form part of the corps to which they are attached<sup>1</sup>: — PROVIDED that no person belonging to the militia shall be required to serve for a longer period, or in any other country, than that during and in which he might have been required to serve, or shall be liable to any greater punishment than that to which he might have been subjected, if this Act had not passed.

Militia may be attached to regular forces.

106. HER Majesty may, by order of one of her Principal Secretaries of State, and subject to such conditions as may be determined by him, attach to any corps of the army in the United Kingdom any corps of yeomanry or volunteers; and the officers, non-commissioned officers, and men (including the permanent staff) of any corps so attached shall be deemed for all purposes to form part of the corps of the army to which they are attached<sup>2</sup>: — PROVIDED that no person belonging to the yeomanry or volunteers shall be required to serve in any other manner than that in which he might have been required to serve, or shall be liable to any greater punishment than that to which he might have been subjected, if this Act had not passed.

Yeomanry or volunteers may be attached to regular forces.

<sup>1</sup> These sections were added in 1872, and an order issued in 1873 (see also G. O. 32 of 1873).

<sup>2</sup> See note p. 224. In 1873 a section (107) was added to the Mutiny Act to facilitate legal proceedings under the Poor and Bastardy Laws.

## APPENDIX C.—CHAP. II. PAR. 37.

### CONTENTS OF THE ARTICLES OF WAR (1873).

#### SECTION I.

##### MISCELLANEOUS DUTIES AND LIABILITIES.

ARTICLE	PAGE
1. Musters .. .. .	255
2. Pay of officers absent without leave, &c. .. .. .	255
3. Concealment by recruit on enlistment .. .. .	255
*4. Concealment on re-enlistment .. .. .	256

ARTICLE	PAGE
*5. Furloughs .. .. .	256
6. Suttlings .. .. .	256
7. Crying down credit .. .. .	257
*8. Ill-treatment of landlords, and reparation to .. .. .	257
9. Carriages .. .. .	258
10. Care of arms, &c. .. .. .	258
11. ——— captured stores .. .. .	258
12. Redress of wrongs; officers .. .. .	258
*13. ——— ; soldiers .. .. .	258
14. Maintenance of good order .. .. .	259
15. Power to quell quarrels and frays .. .. .	259
16. Provoking speeches or gestures .. .. .	259
17. Proceedings on commission of civil offences .. .. .	259
18. ——— military offences .. .. .	259
19. Custody of offenders .. .. .	260
20. ——— .. .. .	
*21. Discharging soldiers .. .. .	260
*22. ——— .. .. .	
*23. Regimental boards of inquiry previous to discharge of soldiers .. .. .	261
24. Monthly returns, transmission of .. .. .	261
25. ———, Ireland and Scotland .. .. .	261
26. ———, abroad .. .. .	261
27. Entry of commissions .. .. .	261
28. Regimental Debts Act, and royal warrant thereunder .. .. .	261
*29. Soldier's book .. .. .	261
30. Accounts .. .. .	262

## SECTION II.

## CRIMES AND PUNISHMENTS.

## CRIMES WITH REGARD TO DIVINE WORSHIP.

*31. For not attending Divine service, &c. .. .. .	262
*32. Absence from garrison or regimental school .. .. .	262
*33. For absence of chaplain .. .. .	262
*34. For misconduct of chaplain .. .. .	263

## PERJURY.

*35. How punishable .. .. .	263
-----------------------------	-----

## MUTINY AND INSUBORDINATION.

*36. Mutiny and sedition .. .. .	263
*37. Violence to superior .. .. .	263
*38. Disobedience .. .. .	263
*39. Traitorous words against the royal family .. .. .	264
*40. Disobeying orders in cases of fray .. .. .	264
*41. Disrespect to Commander-in-Chief .. .. .	264

## DESERPTION, AND ABSENCE WITHOUT LEAVE.

*42. Desertion .. .. .	265
*43. Absence without leave .. .. .	265
*44. Persuading to desert; concealing deserter .. .. .	265
*45. As to a militiaman enlisting into the army .. .. .	265
*46. Confession of desertion by a soldier while serving .. .. .	265
*47. Powers of the Commander-in-Chief to dispense with trial in cases of desertion; and as to restoration of pay .. .. .	266

ARTICLE	PAGE
*49. As to deserters from several regiments .. .. .	267
*50. Absence without leave punishable by general or other court-martial, or by commanding officer; other offences punishable by commanding officer .. .. .	267
OFFENCES IN THE FIELD, CAMP, GARRISON, OR QUARTERS.	
*51. Holding correspondence with or relieving the enemy .. .. .	268
*52. Cowardice .. .. .	268
*53. Search for plunder .. .. .	269
*54. Betraying the watchword .. .. .	269
*55. Giving false alarms .. .. .	269
*56. Casting away arms in presence of the enemy .. .. .	269
*57. Sleeping on post, or quitting it .. .. .	269
*58. Violence to bringer of provisions, &c. .. .. .	269
*59. Unauthorized flag of truce .. .. .	270
*60. Giving a different parole or watchword .. .. .	270
*61. Spreading false reports in the field .. .. .	270
*62. Creating alarm or despondency in action .. .. .	270
*63. Improper Disclosures .. .. .	270
*64. Quitting the ranks without orders .. .. .	271
*65. Leaving guard or post, becoming prisoner by neglect .. .. .	271
*66. Seizing supplies contrary to orders .. .. .	271
*67. Conniving at exaction from sutlers .. .. .	271
*68. Impeding provost marshal or other officers in execution of duty .. .. .	271
*69. Breaking arrest; escape from prison .. .. .	271
*70. Absence from parade .. .. .	272
*71. Giving false alarms at home .. .. .	272
*72. Not reporting a prisoner within 24 hours .. .. .	272
*73. Allowing escape of prisoner .. .. .	272
*74. Unnecessary detention of a prisoner .. .. .	272
*75. Neglecting orders .. .. .	272
DRUNKENNESS	
*76. Drunk on duty under arms .. .. .	272
*77. Drunk on duty or parade .. .. .	273
*78. Habitual drunkenness .. .. .	273
DISGRACEFUL CONDUCT.	
*79. Scandalous behaviour of an officer .. .. .	273
*80. Embezzlement of money or stores .. .. .	274
*81. Malingering, &c. .. .. .	274
Self-mutilation .. .. .	274
Maiming another soldier .. .. .	274
Tampering with eyesight .. .. .	274
Stealing or receiving stolen money or goods .. .. .	274
Stealing or embezzling Government money or property .. .. .	275
Petty offences of a felonious nature .. .. .	275
Any other disgraceful conduct .. .. .	275
*82. Courts of inquiry to be held in the cases of soldiers who become maimed or mutilated .. .. .	275
*83. Soldiers tampering with their eyes, how to be dealt with .. .. .	275
FALSE RETURNS	
*84. False return or wilful omission in making returns .. .. .	
*85. — musters .. .. .	
*86. — certificates on discharges, &c. .. .. .	



ARTICLE	PAGE
123. Sentences of general courts-martial not to be executed till duly confirmed .. .. .	285
124. ——— detachment general courts-martial not to be executed till duly approved and confirmed .. .. .	285
125. Commissioned officers convicted by general courts-martial may be reduced in rank or imprisoned, but not otherwise suspended from duty or pay .. .. .	285
*126. Powers of general, district, or garrison courts-martial as to imprisonment .. .. .	286
*127. Sentences of district or garrison courts-martial not to be executed till duly confirmed .. .. .	286
128. Powers of district courts-martial on warrant officers .. .. .	286
*129. Powers of regimental and detachment courts-martial; sentences to be duly confirmed .. .. .	287
*130. Powers of general, district, or garrison courts-martial as to stoppages of pay .. .. .	287
*131. ——— .. .. .	288
*132. ——— .. .. .	288
133. As to stoppages for making away with medals .. .. .	288
134. As to remission of stoppages by the Commander-in-Chief .. .. .	288
*135. Powers of regimental or detachment courts-martial on the line of march .. .. .	288
*136. Regimental courts-martial not to try for desertion or for absence without leave exceeding 21 days, unless permission is granted ..	289
*137. Power to reduce non-commissioned officers .. .. .	289
138. As to terms and places of imprisonment .. .. .	289
139. ——— .. .. .	290
*140. Regimental courts-martial not to try grave offences .. .. .	290
141. Commutation of a sentence of death .. .. .	291
142. ——— penal servitude .. .. .	291
143. Trial by courts-martial of civil offences in our dominions beyond seas, other than the East Indies, where there is no civil jurisdiction .. .. .	291
144. Trial of civil offences in the East Indies .. .. .	292
145. ——— out of our dominions .. .. .	292
<b>MIXTURE OF OFFICERS.</b>	
146. Of marine officers with officers of the land forces, &c. .. ..	293
147. Of household troops on courts-martial amongst themselves ..	294
148. ——— with other corps .. .. .	294
149. ——— when detached .. .. .	294
150. Of artillery, for differences amongst themselves .. .. .	295
151. Of militia .. .. .	295
<b>PROCEEDINGS ON TRIALS.</b>	
152. Of courts-martial; oaths to be taken .. .. .	295
153. Oaths of witnesses .. .. .	296
*154. Previous convictions may be brought in evidence .. .. .	297
155. Mode of proving a previous conviction by a court-martial .. ..	297
156. ——— court of ordinary criminal jurisdiction .. .. .	297
157. Report of proceedings of general, district, and garrison courts-martial to be sent to the Judge Advocate General .. .. .	297
158. As to right to a copy of the proceedings .. .. .	298
159. Prosecutor or witness for prosecution not to act as Judge Advocate	298
160. Hours of sitting .. .. .	298
161. Penalty on disturbance of proceedings .. .. .	298



ARTICLE	PAGE
162. Conduct in court and order of voting .. .. .	299
163. No person to be tried twice for the same offence; no second revision allowed.. .. .	299

## PROVOST MARSHALS.

164. Appointment, duties, and powers of .. .. .	299
---	-----

## BOARDS AND COURTS OF INQUIRY.

165. For inspection of wounded officers .. .. .	300
*166. Previous to discharge of soldiers .. .. .	301
167. On absence of soldiers for twenty-one days .. .. .	302

## FORFEITURE OF PAY.

168 to 174. } Forfeiture of pay, service, medals, &c. .. .. .	{ 302-304
175. } Powers .. .. .	{ 304
176. } .. .. .	{ 305
177. } .. .. .	{ 305
178. } .. .. .	{ 305
179. Stoppage of rations, &c., in cases of misconduct on board ship .. .. .	305

## SECTION IV.

## RANK.

180. Regimental and brevet .. .. .	305
181. Life guards, horse guards, and foot guards .. .. .	305
182. Life guards .. .. .	306
183. Foot guards .. .. .	306
184. Late East India Company's service and Indian army .. .. .	306
185. Provincial officers, North America .. .. .	306
186. Regulars, militia, fencibles, and volunteers .. .. .	306

## SECTION V.

## APPLICATION OF THE ARTICLES.

187. Persons subject to military discipline .. .. .	307
188. Construction of articles .. .. .	308
189. No person to be liable to punishment extending to life or limb or penal servitude, except for crimes expressly declared to be so punishable .. .. .	308
190. Troops abroad .. .. .	308
191. ——— on board ships of war or transport .. .. .	309
192. Promulgation of the articles .. .. .	310

\* Notice of the law against seducing persons in Her Majesty's forces from their duty, or inciting them to mutiny .. .. . 310

NOTE.—The articles marked with an asterisk (\*) are to be read aloud to the troops once in three months.



may be transferred to any garrison, or veteran or invalid battalion or company, notwithstanding he shall have enlisted for any particular regiment or corps, and shall be entitled to receive such proportion or residue of bounty only as our Secretary of State for War may allow, instead of the bounty to which such recruit would have been otherwise entitled.

#### CONCEALMENT ON RE-ENLISTMENT.<sup>1</sup>

\*4. IF any person discharged from our army for disability, misconduct, or for any other cause, shall subsequently re-enter the army, and shall, at the time of his being attested, conceal the fact, or misrepresent the cause of his former discharge; — he shall neither be allowed to reckon his past service, nor to receive any pension, if again discharged for disability.

#### FURLOUGHS.<sup>2</sup>

\*5. COMMANDING officers of regiments in Great Britain and Ireland are authorized to grant furloughs to soldiers, subject to the control of the general officers under whose command the regiments may be serving; — but these indulgences are not to be granted during the seasons for reviews, field exercise, and inspections; — viz. between the tenth day of March and twenty-fifth day of October in each year; — except under peculiar and urgent circumstances; — the number of soldiers to whom furloughs may be granted, between the twenty-fifth day of October and tenth day of March following, is to be regulated according to the general order which may be issued on that head; — and when any soldier on furlough shall be detained by sickness or other casualty beyond the time therein limited, any military officer, not below the rank of captain, or any adjutant of regular militia, or when there is not any such officer within a convenient distance, then any justice, may grant an extension of such furlough for a period not exceeding *one month*, notifying the same to the commanding officer of the corps to which the man belongs, or to the agent of the regiment.

#### SUTTLEING.<sup>3</sup>

6. NO suttler shall be permitted to sell any kind of liquors or victuals or to keep his house or shop open for the entertainment of soldiers, after *nine o'clock* at night, or before the beating of the reveilles, nor shall he be permitted to sell liquors of any sort during such time or times as he shall be forbidden so to do by the officer commanding the troops in the barracks to which the canteen belongs; — nor

<sup>1</sup> In 1830 as 113th Article.

<sup>2</sup> Art. 25 of 1717. In 1748 the C. O. could give furloughs at two men per Company.

<sup>3</sup> Art. 29 of 1717; and see sec. 8 (Art. 2) of Art. of 1748.

upon Sundays during Divine service or sermon ; — on the penalty of being dismissed from all future suttling ; — but all officers, soldiers, and suttlers shall have full liberty to bring into any of our forts or garrisons any quantity or species of provisions, eatable or drinkable, except where any contracts are entered into by us, or by our order, for furnishing such provisions ; — (this exception extends only to the species of provisions so contracted for ; ) — and all officers commanding in our forts, barracks, or garrisons, are required to see, as they shall be answerable to us for their neglect, that the persons permitted to suttle, supply the soldier with good and wholesome provisions, at the market price.

#### CRYING DOWN CREDIT.<sup>1</sup>

7. THE commanding officer of every corps shall, upon its first coming to any place where it is to remain in quarters, cause public proclamation to be made that if the landlords or other inhabitants suffer the soldiers to contract debts, such debts will not be discharged ; — the said commanding officer refusing or neglecting so to do shall be suspended for *three months*, during which time his whole pay shall be applied to the discharging of such debts as shall have been contracted by the soldiers under his command beyond the amount of their daily subsistence ; if there be any overplus remaining it may be returned to him : — if after public proclamation made as above directed the inhabitants shall notwithstanding suffer the soldiers to contract debts with them, it will be at their own peril, the officers not being obliged to discharge such debts.

#### BILLETS.<sup>2</sup>

\*8. IF any complaint shall be made against any officer or soldier of ill-treatment of landlords by violence, extortion, or making disturbances in billets, the officer commanding shall, after proof of the justice of the complaint, cause reparation to be made, either by causing the offender to be tried for the offence, or by making compensation in money, to the extent of stopping half the offender's pay daily until the demand be satisfied or full reparation be made ; and if such commanding officer shall refuse or neglect to cause such reparation to be made he shall be deemed equally culpable as the actual offender ; — and if the officer or soldier shall protest against such summary proceeding of his commanding officer, the matter 11

<sup>1</sup> The original order for this is to be found in the W. O. Mis. Bk. (i) See also 4 W. & M. c. 13, s. 22, and 8 & 9 Will. III. c. 13, s. 4 ; also Vol. and Chap. VII. par. 42. *ante*.

<sup>2</sup> This (8) was Article 33 of 1717.

be inquired into, and, if necessary, tried before a competent court-martial.

#### CARRIAGES.<sup>1</sup>

9. THE commanding officer of every corps ordered to march is to apply to the proper magistrates for the necessary carriages; — and to pay for them as directed by the Mutiny Act.

#### ARMS AND STORES.<sup>2</sup>

10. EVERY captain is charged with the arms, accoutrements, ammunition, clothing, or other war-like stores belonging to the troop or company under his command, for which he is to be accountable to his colonel or officer commanding the regiment, in case of their being lost, spoiled, or damaged, not by unavoidable accident or on actual service.

11. <sup>3</sup>ALL public stores taken from the enemy, whether of artillery, ammunition, engineer stores, clothing, forage, or provisions, shall be secured for our service, and the officers commanding in chief are to be answerable to us for any neglect in this respect.

#### REDRESS OF WRONGS.<sup>4</sup>

12. IF any officer shall think himself wronged by his commanding officer, and shall, upon due application made to him, not receive the redress to which he may consider himself to be entitled; — he may complain to the general commanding in chief of our forces, in order to obtain justice; — who is hereby required to examine into such complaint; — and either by himself, or by our Secretary of State for War, to make his report to us thereupon, in order to receive our further directions.

\*13.<sup>4</sup> IF a non-commissioned officer or soldier shall think himself wronged [in any<sup>5</sup> matter affecting his pay or clothing] by his captain, or other officer commanding the troop or company to which he belongs, he is to complain thereof to the commanding officer of the regiment, who is hereby required to summon a *regimental* court of inquiry for the purpose of determining whether such complaint is just; — from the decision of which court of inquiry either party may, if he thinks himself still aggrieved, appeal to a *general* court-

<sup>1</sup> This (9) was Article 34 of 1717.

<sup>2</sup> Art. 43 of 1717, and sec. 13 Art. 4 of 1748. Each Captain is responsible out of his contingent allowance for damage to arms, &c. Vol. I. p. 41, and Vol. II. pp. 115, 209, and 675.

<sup>3</sup> Art. 17 of 1717, and sec. 14 Art. 20 of 1748.

<sup>4</sup> Art. 19 of 1717, and sec. 12 of 1748. See Chap. VI. para. 12 and 13; XI. par. 24. The recent cases of *Dawkins v. Rokeby*, 4 Foa. and Fin. p. 833, and 8 L. R. (Q. B. p. 266); *Keighley v. Bell*, *ib.* p. 798.

<sup>5</sup> Inserted in 1856.

martial; — [1 and such court shall hear and determine the merits of the appeal, and after determining the same, and after allowing the appellant to show cause to the contrary, by himself, and by witnesses, if any, may either confirm the appeal or dismiss it without more, or may, if it shall think fit, pronounce such appeal groundless and vexatious, and may thereupon sentence such appellant to such punishment as a general court-martial is competent to award : — 2 Provided that no stoppage of pay in respect of barrack damage duly assessed by a court of inquiry shall give any non-commissioned officer or soldier a right of appeal to a general or other court-martial.]

#### MAINTENANCE OF GOOD ORDER.\*

14. EVERY commanding officer shall keep good order, and to the utmost of his power redress all disorders committed by any officer or soldier under his command ; — and all officers and soldiers are to behave themselves orderly in quarters and on their march, and are not to quit their camp or quarters, or to fail at parade.

15.4 ALL officers, of what condition soever, have power to quell all quarrels, frays, and disorders, though the persons concerned should be of superior rank, or belong to another corps, and either to order officers into arrest, or soldiers into confinement, until their proper superior officers shall be acquainted therewith.

16.5 NO officer shall use any reproachful or provoking speeches or gestures to another.

#### PROCEEDINGS ON COMMISSION OF OFFENCES.\*

17. WHENEVER any officer or soldier shall be accused of a capital crime, or of violence, or any offence against the persons or property of our subjects, punishable by the known laws of the land, the commanding officer and officers of his corps are, upon application duly made in behalf of the party injured, to use their utmost endeavours to deliver over such accused person to the civil magistrate ; — and assist the officers of justice in apprehending and securing him.

18. WHENEVER any person 7 subject to the Mutiny Act shall be charged with committing an offence, he shall, if an officer, be

<sup>1</sup> Inserted in 1844.

<sup>2</sup> Inserted in 1872.

<sup>3</sup> Art. 34 of 1717.    <sup>4</sup> Art. 20 of 1717, and adverted to in Chap. VIII. par. 7.

<sup>5</sup> Art. 20 of 1717.

<sup>6</sup> Art. 18 of 1717, and sec. 11 of 1748.

<sup>7</sup> This was first inserted in the Articles of 1722 (See *Mis. Bk.*, p. 226). In Articles for 1742 the man was to be tried by a Regimental Court, or application made to the Secretary at War for a General Court. It was remodelled in 1748 as section 15, Articles 18, 19, and 21 of that Code, and in 1867. Chap. VIII. par. 10.

put in arrest, and if a soldier, be put in confinement, and shall, within a reasonable time,<sup>1</sup> either be brought to trial before a court-martial, or be discharged from the said arrest or confinement.

19.<sup>2</sup> NO officer commanding a guard, or provost marshal,<sup>3</sup> shall refuse to receive or keep any prisoner committed to his charge by any officer or non-commissioned officer belonging to our forces; — and every such officer or non-commissioned officer shall, at the same time, [or without<sup>4</sup> unnecessary delay,] deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged.

#### DISCHARGES.

20.<sup>5</sup> EVERY commissioned officer sentenced to be kept in penal servitude, on such sentence being confirmed, shall cease to belong to our service.

\*21.<sup>6</sup> SOLDIERS, having been duly enlisted and attested, shall not be dismissed our service without a discharge or certificate, [‘ granted according to the general order on that head, which shall be in force at the time of granting the discharge. ]

\*22.<sup>7</sup> NO soldier shall be discharged, unless by sentence of court-martial, or by order of our Commander-in-Chief, certified by an

<sup>1</sup> The alteration from eight days to “reasonable time,” has been adverted to in Chap. V. par. 57. *Keighley v. Bell*, 4 Fos. and Fin. p. 798, and *Dawkins v. Rokeby*, *ib.* p. 820, were decided on this Article. Sec. 6, par. 27 :—“Soldiers charged with an offence and placed in confinement under the provisions of the 18th Article of War, are not to be detained in custody for a longer period than forty-eight hours—exclusive of Sundays—without having their cases enquired into, and either summarily disposed of or reported to superior authority.” *Queen’s Regulations*, September 1873.

<sup>2</sup> Art. 44 of 1717, and sec. 15 Art. 20 of 1748. The Article has been discussed in Chap. V. par. 54. The cases of *Warden v. Bailey*, 4 Taunt. Rep. p. 86, *Wolton v. Gavin*, 16 Q. B. Rep. p. 48, were decided upon it.

<sup>3</sup> He is also the custodian of Prisoners of War. G. O. 19th May 1809.

<sup>4</sup> Inserted in 1855. <sup>5</sup> This was first inserted in 1844 (sec. 8 of Mutiny Act).

<sup>6</sup> Art. 13 of 1717. It must not be supposed that the “discharge” is the only test of status. It was held so to be in *Grant v. Gould*, but then the enlistments being for life, the onus of proof rested on the enlisted Soldier to prove his discharge. With “limited” enlistments effluxion of time terminates the contract.

<sup>7</sup> Added in 1817.

<sup>8</sup> These are for the protection of the Soldier from the power of the Officer, not of the Crown. That power of dismissal is unlimited, and not affected by these Articles. Vol. II. p. 37. When the Regiment had to provide Recruits (as the Guards now have to do), the dismissal was always in the hands of the Colonel: but now the discharge of a man throws the cost of a new Recruit and of an old Soldier (as a Pensioner) on the Public, hence this power is limited. Vol. II. pp. 40, 279–290. In *Freer v. Marshall*, 4 Fos. and Fin. p. 485, the Soldier brought an action to recover damages for his discharge, but failed.

officer of the adjutant general's department; — or by authority direct from us; — except in the cases of soldiers serving on foreign stations, where general officers commanding are authorised, under such regulations and restrictions as may from time to time be prescribed by our Commander-in-Chief, to direct that soldiers shall be discharged.

\*23.<sup>1</sup> NO soldier shall be discharged, whether for unfitness or for any other cause, unless his services, conduct, character, and the cause of his discharge be ascertained before a regimental board, as hereinafter provided; — [<sup>2</sup> but when a soldier shall have been sentenced to penal servitude he may be discharged forthwith by order of our Commander-in-Chief, and such discharge shall not affect the execution of his sentence.]

#### RETURNS AND ACCOUNTS.

24.<sup>3</sup> THE commanding officer of every corps, at home and abroad, shall, on the first of every month, transmit to the Commander-in-Chief of our forces, and to our Secretary of State for War, an exact return of the state of such corps, specifying the names of the officers absent, and the reason for and time of their absence.

25.<sup>1</sup> RETURNS shall be made, in like manner, of the state of our forces in Ireland, to the Lord Lieutenant or chief governors thereof, and to the general officer there commanding; — and of our forces in Scotland to the officer there commanding.

26. EXACT returns of the state of our garrisons and corps stationed abroad shall be transmitted by their respective governors or commanders there residing, by all convenient opportunities, to our Commander-in-Chief and Secretary of State for War.

27.<sup>4</sup> ALL commissions granted by us, or by any of our generals having authority from us, shall be entered in the books of our Secretary of State for War, otherwise they will not be allowed of at the musters.

28. IT shall be the duty of all officers and soldiers to observe and conform to the provisions contained in the Regimental Debts Act, 1863, and in the regulations for the better execution of the purposes of the said Act prescribed from time to time by warrant under the royal sign manual.

\*29. EVERY non-commissioned officer and soldier of our forces

<sup>1</sup> See Note \* on p. 260.

<sup>2</sup> Added in 1863.

<sup>3</sup> Inserted in 1748.

<sup>4</sup> As to former necessity for this, see Vol. II. p. 73.



shall be provided with a book<sup>1</sup> calculated to show his services, age, date of enlistment, and the actual state of his accounts, in conformity with our regulations on this head;—and every commanding officer shall state, upon the monthly return of the regiment under his command, whether all the non-commissioned officers and soldiers of the regiment are in possession of the said books, and whether the orders on this head are properly attended to.

30. THE accounts of our forces shall be made up and transmitted according to such regulations as we may think fit to establish in relation thereto.

## SECTION II.

### CRIMES AND PUNISHMENTS.

#### CRIMES WITH REGARD TO DIVINE WORSHIP.

31. ANY officer or soldier who, not having just impediment, shall not attend Divine service in the place<sup>2</sup> appointed for the assembling of the corps to which he belongs;— or who, being present, shall behave indecently or irreverently;— or who shall offer violence to a chaplain of the army, or to any other minister of God's Word, shall be liable, if an officer, to such punishment as by a *general* court-martial shall be awarded, and if a soldier, to such punishment as by a *general, district, or garrison* court-martial shall be awarded.

32. ANY non-commissioned officer or soldier who, without due cause or without leave from his commanding officer, shall absent himself from the garrison or regimental school,<sup>3</sup> when duly ordered to attend there, shall be liable to be tried before a court-martial for disobedience of orders, or be subject to such punishment as it may be competent for his commanding officer to award.

33.<sup>4</sup> ANY commissioned chaplain who shall absent himself from his duty (excepting in case of sickness or leave of absence) shall be

<sup>1</sup> This Book was introduced in 1816 (compare sec. 17 in Articles of War, 1815 and 1816), but its use was extended at the instance of the late Lord Hardinge, in 1829 (see W. O. Circular 289), and is known as "Tommy Atkins." Vol. ii. pp. 58-60; and Hough (1825), p. 550.

<sup>2</sup> This has been adverted to in Chap. II. par. 38. Parliament refused to alter this Article in 1811. See 19 H. D. (O. S.), p. 368.

<sup>3</sup> This article is inserted to meet the case of *Warden v. Bailey*, 4 Taunt. Rep. p. 67, and Vol. II. p. 554.

<sup>4</sup> In Articles of 1748.

brought before a *general* court-martial, and punished as the circumstances of his offence may require.

34. ANY commissioned chaplain who shall be guilty of misconduct<sup>1</sup> or vicious behaviour derogating from the sacred character with which he is invested, shall, on conviction before a *general* court-martial, be discharged from his office.

#### PERJURY.

35.<sup>2</sup> EVERY commissioned officer convicted before a *general* court-martial of perjury shall be cashiered ; — and every soldier or other person subject to these articles convicted thereof before a *general*, *district*, or *garrison* court-martial, shall be liable to such punishments as such court may award.

#### MUTINY AND INSUBORDINATION.

36.<sup>3</sup> ANY officer or soldier who shall begin, excite, cause, or join in any mutiny or sedition in any of our land or marine forces, or in any party, post, detachment, or guard, on any pretence whatever ; — or who, being present at any mutiny or sedition, shall not use his utmost endeavour to suppress the same ; [<sup>4</sup> or who shall conspire with any other person to cause a mutiny ;] — or who, coming to the knowledge of any mutiny or intended mutiny, shall not without delay give information thereof to his commanding officer ; — or

37.<sup>5</sup> WHO shall strike a superior officer, or use or offer any violence against him, being in the execution of his office ; — <sup>6</sup> or who, being confined in a military prison, shall strike, use, or offer any violence against a visitor or other his superior military officer, being in the execution of his office ; — or

38. WHO shall disobey the lawful command<sup>7</sup> of his superior officer ; —

<sup>1</sup> This was "drunkenness or other scandalous," in 1748.

<sup>2</sup> This was first inserted in 1860 (see 40th Art.). The former method of dealing with perjury is shown in Chap. IX. par. 51.

<sup>3</sup> Art. 8 of 1717.

<sup>4</sup> Inserted in 1868.

<sup>5</sup> In 1847.

<sup>6</sup> May the order be... 4 Taunt. Rep. p. 76; and see the discussion on 4th vol. ii. p. 136, as to the "If a soldier refuse of a non-commissioned... authority... to..."

SHALL, if an officer, suffer DEATH, or such other punishment as by a *general* court-martial shall be awarded ; —

AND, if a soldier, shall suffer DEATH, PENAL SERVITUDE for a term not less than five years, or such other punishment as by a *general* court-martial shall be awarded.

39. Any officer or soldier who shall use traitorous or disrespectful words against our royal person,<sup>1</sup> or any of our royal family ; — or

40.<sup>2</sup> WHO, being concerned in any fray, shall refuse to obey any other officer (though of inferior rank) who shall order him into arrest ; — or shall draw his sword upon or offer violence to such officer ; —

SHALL, if an *officer*, on conviction of any one of the aforesaid offences, before a *general* court-martial, be CASHIERED ; — and if a *soldier*, shall, on conviction thereof before a *general, district, or garrison* court-martial, be liable to such punishments as such court may award.

41. ANY officer or soldier who shall behave with contempt or disrespect towards the general<sup>3</sup> or other commander-in-chief of our forces, or shall speak words tending to his hurt or dishonour ; — [‘or shall strike or offer violence’] or use threatening [or insubordinate<sup>5</sup>] language to his superior officer ; —

SHALL, if an *officer*, on conviction thereof, be LIABLE to be CASHIERED ; — or to suffer such other punishment, according to the nature and degree of the offence, as by the judgment of a *general* court-martial may be awarded ; — and if a *non-commissioned officer or soldier*, shall, on conviction thereof, be punished according to the nature and degree of the offence, by a *general, district, garrison, regimental*, or other court-martial.

coming in contact with him—except under unavoidable circumstances.” Queen’s Regulations, September 1873.

<sup>1</sup> The “Prince of Wales” was also specified in the Articles of 1748.

<sup>2</sup> Art. 20 of 1717.

<sup>3</sup> This always has been a Military offence. “The General’s authority,” wrote Bruce, in 1717, “should be with a nod, and by his looks he should strike in them an awful regard for his person. For his authority being once sunk, and his person rendered cheap and contemptible with the Soldiery, ’tis more than probable their insolence will not stick there, but that at length, Actæon-like, he will be devoured by the beasts he feeds,” p. 159. Art. 7 of 1717.

The Duke of Marlborough (not unlike another General) thought equal respect ought to be shown to his wife, and in 1705 the W. O. Letter Books show a correspondence on the subject (33), pp. 233 and 253.

<sup>4</sup> Added in 1863.

<sup>5</sup> Added in 1868.

## DESERTION, AND ABSENCE WITHOUT LEAVE.

42.<sup>1</sup> ANY officer who shall desert our service shall suffer DEATH, or such other punishment as by a *general* court-martial shall be awarded ; —

ANY non-commissioned officer or soldier who shall desert our service shall suffer DEATH, or such other punishment as by a *general* court-martial shall be awarded ; — and if tried by a *district* or *garrison* court-martial, shall suffer such punishment as such court may award ; — and any non-commissioned officer or soldier enlisted or in pay in any regiment or corps who shall, without having first obtained a regular discharge therefrom, enlist himself in our army, may be punished as a deserter from our service. [<sup>2</sup> Upon the conviction by court-martial of any soldier of the crime of desertion, our Commander-in-Chief may, and if the court-martial has been held on a foreign station, the general or other officer commanding at such station may, order such soldier to serve in any regiment or corps.]

43. ANY soldier may be tried for desertion without reference to the time during which he may have been absent, and may thereupon be found guilty either of desertion or of absence without leave.<sup>3</sup>

44.<sup>4</sup> ANY officer or soldier who shall advise or persuade any other officer or soldier to desert our service ; — or who shall knowingly receive and entertain any deserter, and shall not immediately on discovery give notice to his commanding officer, or to our Secretary of State for War, or shall not cause such deserter to be apprehended by the civil power ; —

SHALL, if an *officer*, on conviction thereof before a *general* court-martial, be CASHIERED ; — and if a *soldier*, shall, on conviction thereof before a *general*, *district*, or *garrison* court-martial, be liable to such punishments as such courts may award.

45. IF any man while belonging to a militia regiment, or to the volunteer permanent staff, shall enlist in and be attested for our army, he may be dealt with in the manner provided for in the 50th section of the Mutiny Act.<sup>5</sup>

46.<sup>6</sup> IF any soldier while serving in any regiment or oor

<sup>1</sup> Arts. 12 and 13 of 1717.

<sup>2</sup> Added in 1867.

<sup>3</sup> Chap. IX. pars. 63, 64. This Article was inserted in 1847 (126)

tinued from 1860 until 1871) to form part of an Article  
Soldier absent without leave for twenty-one days shc |  
a General or District Court, unless special permission |  
Regimental Court. <sup>4</sup> Art. 14 of 1717. <sup>5</sup> Art. 50 of

confess to his commanding officer that he is a deserter from some other regiment or corps, or from the militia, and evidence of the truth or falsehood of such confession cannot then be conveniently obtained, a record of such confession, signed by such commanding officer, shall be entered in the regimental books, and such soldier shall continue to do duty in the regiment or corps in which he shall then be serving, or in any other regiment or corps to which he may be transferred, until he shall be discharged, or until legal proof can be obtained of the truth or falsehood of such confession, of the making of which confession the said record, or a copy thereof purporting to bear the signature of the officer having the custody of the regimental books, shall be sufficient evidence; [— and in any case where such confession shall then appear to be true, such soldier may be arraigned before a *general, district, or garrison* court-martial on a charge for desertion, and, if convicted, may be punished accordingly; — and where such confession shall appear to be false, such soldier may be arraigned before a *district or garrison* court-martial on a charge for making a false statement to his commanding officer; —] and he may, if convicted, be sentenced, in addition to imprisonment, with or without hard labour, to forfeiture of all advantage as to good-conduct pay, and pension on discharge, which might otherwise have accrued from his former service, and to forfeiture of any good-conduct badges, medals, decorations, and of any annuities or gratuities relating thereto; — [<sup>1</sup>a letter purporting to be written in reply to an inquiry respecting the truth or falsehood of such confession, and to be signed by or on behalf of the commanding officer of the regiment or corps from which such soldier confesses himself to have deserted, shall be admissible in evidence against such soldier, and shall be deemed to be legal evidence of the facts stated therein.]

47.<sup>2</sup> OUR Commander-in-Chief may, and any general or other officer commanding on any foreign station, may, within his command, dispense with the trial of any soldier confessing desertion, if he shall so think fit, and may thereupon order such soldier to serve in any regiment or corps; — and such soldier shall thereupon forfeit his service for the period between the date of the desertion stated in his confession and the date of the said order to serve, and shall not be allowed to reckon the said period as a part of the limited service for which he was enlisted or re-engaged, or for which his term of service may have been prolonged; and shall also forfeit all advantage as to good-conduct pay, and pension on dis-

<sup>1</sup> Added in 1863.

<sup>2</sup> Arts. 52 and 53 of 1860, but remodelled 1866.

charge, which might have otherwise accrued from the length of his former service, and shall also forfeit all medals and decorations whatsoever which he may be in possession of and authorized to wear, together with any annuity or gratuity thereto appertaining; — but any such soldier, if he shall have subsequently performed good, faithful, or gallant services in our army, may, on the same being duly certified by our Commander-in-Chief, be eligible to be restored to the benefit of the whole or of any part of his service; and should the restoration be approved by us, our order for the same will be signified through our Secretary of State for War.<sup>1</sup>

49.<sup>2</sup> EVERY soldier shall be liable to be tried and punished for desertion from any regiment or corps into which he may have unlawfully enlisted, although he may of right belong to another regiment or corps, and be a deserter therefrom; — and any number of charges of desertion may form the subject of a single arraignment.

50.<sup>3</sup> ANY soldier who, without leave from his commanding officer,<sup>4</sup> shall absent himself from his quarters, garrison, or camp, [<sup>5</sup>or from his troop, company, or detachment,] or who, without a pass or leave in writing from his commanding officer, shall be found one mile or

<sup>1</sup> There is no Art. 48.

<sup>2</sup> Art. 54 of 1860.

<sup>3</sup> Sec. 14, Art. 1 of 1748, and Art. 25 of 1717.

<sup>4</sup> Sec. 6, Discipline.—“25. Commanding officers are held responsible for the proper application of the provisions of the Articles of War which empower them to deprive the soldier of his pay for absence without leave for any number of days not exceeding five; but it is to be understood that, in giving effect to this power, commanding officers are not precluded from trying the soldier by court-martial for less than five days' absence without leave, if, upon investigating the case, the circumstances elicited shall appear to call for a heavier punishment. General Officers commanding are alone empowered to dispense with the trial by court-martial of soldiers who are absent without leave for any period over five and under twenty-one days. Commanding officers of corps will invariably award a punishment entailing an entry in the regimental defaulter-book, for cases of absence over five days summarily disposed of under such authority.—Though the absence may not amount to an entire day of 24 hours, the day on which the soldier absents himself and the day on which he returns are to be reckoned as complete days for this purpose.

“26. It would be inconsistent with subordination for a commanding officer to admit the right of option, or appeal from any of the above awards—except in the instances affecting a soldier's pay, sanctioned by the Articles of War; but he may, if he think proper, vindicate the justice of his first order by resorting to the alternative of a court-martial.”

<sup>5</sup> This crime was treated as desertion in and prior to 1749 (sec. 6 Art. 2), that is he was to be “deemed as a deserter,” and punished at the discretion of the C. M. In 1751 till 1828 the crime was continued in the sec. dealing with desertion, but the words “deemed as a deserter” were omitted. It came into this Act in 1833 (Art. 63).

upwards from the camp, shall, on conviction thereof, be punished, according to the degree of the offence, by a *general*<sup>1</sup> or other court-martial.

IF any soldier shall absent himself without leave for any period not exceeding *five* days, and shall not account for the same to the satisfaction of his commanding officer,<sup>2</sup> and if any soldier shall be guilty of any other offence which the commanding officer may not think necessary to bring before a court-martial, the commanding officer may, in addition to any minor punishment he is authorized to award, order that such soldier shall be imprisoned for any period not exceeding *one hundred and sixty-eight* hours, with or without hard labour, or with or without solitary confinement, as the said commanding officer may think fit; — and any soldier who shall have absented himself as aforesaid may in addition to or instead of such imprisonment, or other punishment which the commanding officer has authority to inflict, be further deprived, by order of his commanding officer, of his pay for the day or days of such absence; —

ANY soldier ordered by his commanding officer to suffer imprisonment or deprivation of pay (except in certain cases of fines for drunkenness in which the offence is not denied) shall, if he so request, have a right to be tried by a court-martial for his offence instead of submitting to such imprisonment or deprivation.<sup>3</sup>

#### OFFENCES IN THE FIELD, CAMP, GARRISON, OR QUARTERS.

51.<sup>4</sup> ANY officer or soldier who shall hold correspondence with or give intelligence to the enemy, directly or indirectly, — or relieve with money, victuals, or ammunition, or knowingly harbour or protect, an enemy; — or

52.<sup>5</sup> MISBEHAVE before the enemy, or shamefully abandon or deliver up any garrison, fortress, post, or guard committed to his charge, or which it was his duty to defend; — or shall compel, or speak words, or use other means to induce the governor or com-

<sup>1</sup> Altered from Regimental in 1850 (sec. 2, Art. 59).

<sup>2</sup> The Art. as confined to absence without leave dates from 1836 (52) and enabled the C. O. to deprive of the 5 days' pay, the exercise of which was in 1838 to be in addition to any other punishment he could inflict (52). In 1845 (52) the power of imprisoning for 2 days with stoppage of pay, and power to stop pay for the absence in lieu of other punishment, if the soldier so desired it, was given.

<sup>3</sup> This option was given in 1838.

<sup>4</sup> Art. 7 of 1717, and sec. 14 Art. 18 of 1748.

<sup>5</sup> Art. 16 of 1717, and sec. 14 Art. 13 of 1748.

manding officer, or any other person, to deliver up to the enemy or to abandon, any garrison, fortress, post, or guard; — or

53.<sup>1</sup> LEAVE his commanding officer or his post to go in search of plunder; — or

54.<sup>3</sup> TREACHEROUSLY make known the watchword to any person not entitled to receive it according to the rules and discipline of war; — or

55.<sup>4</sup> BY discharging fire-arms, drawing swords, beating drums, making signals, using words, or by any means whatever, intentionally occasion false alarms in action, camp, garrison, or quarters; — or

56.<sup>5</sup> CAST away his arms or ammunition in presence of an enemy; — or

57.<sup>6</sup> WHO, being a sentinel, shall be found sleeping on his post or shall leave it before being regularly relieved; — or

58.<sup>7</sup> WHO, being employed in foreign parts, shall do violence to

<sup>1</sup> *Ib.*, Art. 21 of 1748.

<sup>2</sup> The Articles of 1748 added, "that he should be reputed a disobeyer of Military Orders, and should suffer death." The passage in Sir William Napier's '*History of the Peninsular War*' (Book 21, Chap. v.) will occur to many readers. "Thus the disobedience of three plundering knaves, unworthy of the name of Soldiers, deprived one consummate Commander (Wellington) of the most splendid success, and saved another (Soult) from the most terrible disaster."

<sup>3</sup> Art. 41 of 1717, and sec. 14, Art. 15 of 1748.

<sup>4</sup> Art. 39 of 1717, and sec. 14, Art. 9 of 1748. See the Duke of Wellington's Despatches, vol. iii. p. 242. G. O. 19 (5) 1809, par. 11, 12, and G. O. of 20 June 1815.

<sup>5</sup> Sec. 14, Art. 14 of 1748. Practically, a rout. See vol. iii. p. 450, and vol. viii. p. 162 of Despatches. As to collecting same after action, G. O. 11 June 1813.

<sup>6</sup> Art. 37 of 1717, and sec. 14, Art. 6 of 1748.

<sup>7</sup> Sec. 14, Arts. 11 and 17 of 1748.

The difficulty in the Peninsular War of repressing the crimes here enumerated, was often made the subject of the Duke's Despatches and General Orders. In the General Orders of May 1809, he warns the Officers "that the Army will very soon be no better than a banditti." Vol. iii. p. 242. In his Despatch to Lord Castlereagh in June, he complains that the powers of the Mutiny Act were not sufficiently stringent for the restraint and punishment of crime, so "that the English Army was worse than an enemy in the country," *ib.* pp. 304, 488; vol. iv. p. 457; vol. v. pp. 583, 705. The difficulty of obtaining a conviction before a Court-martial was very great as the Portuguese were afraid to, and the Soldiers would not, appear as witnesses against the offenders, *ib.* pp. 700 and 766. Whenever, therefore, a conviction was obtained for robbing or illtreating the inhabitants, the sentence was invariably executed, and the Duke gave out in General Orders (February 1810), that such offences he was "determined in no instance to forgive." *Ib.* 753, and vol. iv. pp. 1, 6, 7, 103, and 678.

Even in less important matters, offences against public propriety, the Duke was not less resolute. "If protection of the country means anything, it means



any person bringing provisions or other necessities to the quarters of our forces; — or force a safeguard; — or break into any house or store or cellar for plunder; —

SHALL on conviction of any one of the aforesaid offences suffer DEATH, PENAL SERVITUDE for a term of not less than five years, or such other punishment as by a *general* court-martial shall be awarded.

59.<sup>1</sup> ANY officer or soldier who shall send any flag of truce to the enemy without due authority; — or

60. WHO shall give a parole or watchword different from what he received without good and sufficient cause; — or

61.<sup>2</sup> WHO shall, in operations in the field, spread reports by words or by letters calculated to create unnecessary alarm by spreading such reports, either in the vicinity or in rear of the army; — or

62.<sup>3</sup> WHO shall, in action or previously to going into action, use words tending to create alarm or despondency; — or

63. WHO shall, either verbally or in writing, disclose the numbers, position, magazines, or preparations of the army for sieges<sup>4</sup> or movements, and by such disclosures shall produce effects injurious to our army and our service; — or

protection of its laws and magistrates against our own people, as well as against the common enemy." vol. xiv. (Supp.) Deep. 189, 193. In rebuking some Officers who had misconducted themselves in the theatre at Lisbon, to the annoyance of the audience, he wrote:—"The English public would not bear this, and I see no reason why the Portuguese public should be worse treated" (vol. iii. p. 564); and where the offences committed were punishable by the Local Authorities, he never interfered to screen the guilty, or prevent the law taking its course. lb. pp. 350-461; vol. v. p. 731; vol. vi. p. 382.

<sup>1</sup> As to receiving and sending flags of truce, see General Orders, 1 August 1810, vol. iv. p. 197. This and the following Arts. were first inserted in 1829, based (I think) on G. O. of the Duke issued in the Peninsula.

<sup>2</sup> Art. 16 of 1717. "Not to listen" (as the Duke warned his Officers) "to the senseless reports which invariably prevail on the flank and rear of all Armies." Vol. iii. p. 480, and see vol. viii. p. 156. G. O. 10 Aug. 1810 agreeing with Arts. 61 and 63, and see Art. 25 of 1842.

As to panic with Cavalry, who having horses can fly, vol. iv. p. 615, and vol. iv. of Sir Charles Napier's Life, p. 219.

<sup>3</sup> "The croaking which already prevails in the Army, and particularly about Head-quarters, is disgraceful to the nation, and does infinite mischief to our cause." Vol. iv. p. 266.

<sup>4</sup> "The army should know that to work during a siege is as much part of their duty as it is to engage the enemy in the field." G. O. (D. of W.) 3 Oct. 1812, and vol. ii. chap. 15, par. 113.

64.<sup>1</sup> WHO shall leave the ranks in order to secure prisoners or horses, or on pretence of taking wounded<sup>2</sup> officers or men to the rear, without orders from his superior officer ; — or

65. WHO shall leave his guard, picquet, or post ; — or shall be taken prisoner<sup>3</sup> by any want of due precaution, or by disobedience of orders ; — or fall into the enemy's hands by passing through<sup>4</sup> outposts ; — or

66.<sup>5</sup> WHO shall irregularly detain, seize, or appropriate to his own corps or detachment bread, spirits, forage, or any supplies proceeding to the army, contrary to the orders issued in that respect ; — or

67. WHO, being in command of any of our garrisons, forts, or barracks, shall connive at the exaction of exorbitant prices for houses or stalls let to sutlers ; — or lay any duty upon, or take any fee or advantage, or be in any way interested in the sale of provisions or merchandise brought into places under his command ; — or

68. WHO shall impede the provost marshal or any other officer legally exercising authority ; — or refuse to assist him when requiring his aid in the execution of his duty ; — or

69.<sup>6</sup> WHO, being under arrest, or in prison, shall leave or escape from his confinement before he is set at liberty by proper authority ; —

<sup>1</sup> "The Soldiers," wrote the Duke, "look for and secure captures rather than destroy the enemy." Vol. v. p. 68. "It is an unrivalled Army for fighting if the Soldiers can only be kept in their ranks during the battle." Vol. vi. p. 604, G. O. 3 June 1811. <sup>2</sup> G. O. 11 June 1813.

<sup>3</sup> The pay of these was withheld, until an inquiry showed that it was not by their neglect. 55 Geo. III. c. 108, s. 125, and 31 H. D. (O. S.), p. 831. As to desertion by the Irish Militia, see vol. iv. p. 405, vol. v. pp. 417 and 634.

<sup>4</sup> See the Duke's General Orders, 15 March 1813.

<sup>5</sup> An illustration of the necessity of severe punishment may be given in the following extract :—"A detachment seldom marches, particularly if under the command of a non-Commissioned Officer only (which rarely happens), that a murder or a highway robbery, or some act of outrage is not committed by the British Soldiers comprising it. . . . and I am sorry to add that a convoy has seldom arrived with money that the chests have not been broken open, and some of the money stolen by the Soldiers in whose charge it was placed, and they have never brought up shoes or other necessaries which could be of use to them, or which they could sell, that they have not stolen some of the articles." Vol. iv. Desp. 5-6. The Provost-Marshal had authority given him by the Duke to punish on the spot the heinous crime of plundering provisions coming to the Army. Vol. iii. p. 405. There was no warrant for this in the Military Code till 1829.

<sup>6</sup> Art. 15 of 1717. The Officer was to be cashiered, but the Soldier to die as a Deserter, by sec. 15. Art. 23 of 1748.

SHALL, if an *officer*, on conviction of any one of the aforesaid offences, before a *general* court-martial, be CASHIERED;— and, if a *soldier*, shall on conviction thereof before a *general, district, or garrison* court-martial, be liable to such punishments as shall accord with the provisions of the Mutiny Act and with the usage of the service.

70.<sup>1</sup> Any officer or soldier who shall fail to appear at the place of parade or rendezvous appointed by his commanding officer, or shall go from thence without leave before he shall be relieved; — or who shall, without urgent necessity, quit his platoon or division; — or

71. WHO, in the United Kingdom or British Isles, shall by discharging fire-arms, drawing swords, beating drums, or by any other means whatever, occasion false alarms in camp, garrison, or quarters; — or

72.<sup>2</sup> WHO shall not, within *twenty-four hours* after the commitment of any prisoner, or as soon as he shall be relieved from his guard or duty, give in writing the prisoner's name and crime, and the name and rank of the officer or other person who committed him, to the officer commanding the garrison or regiment to whom he may be ordered to report; — or

73. WHO, when in command of a guard, picquet, or patrol, shall, without proper authority, release any prisoner committed to his charge, or shall suffer him to escape; — or

74. WHO shall unnecessarily detain<sup>3</sup> any prisoner in confinement, without bringing him to trial; — or

75.<sup>4</sup> WHO shall neglect to obey any garrison or other orders;—

SHALL, if an *officer*, on conviction of any one of the aforesaid offences, be LIABLE to be CASHIERED,—or suffer such other punishment, according to the nature and degree of the offence, as by the judgment of a *general* court-martial may be awarded; — and if a *non-commissioned officer* or *soldier*, shall, on conviction of any of the aforesaid offences, be punished according to the nature and degree of the offence by a *general, district, garrison, regimental*, or other court-martial.

#### DRUNKENNESS.

76.<sup>5</sup> IF any officer shall be drunk on any duty under arms, he

<sup>1</sup> Art. 39 of 1717, and sec. 14, Art. 4 of 1748.

<sup>2</sup> Art. 40 of 1717, and Chap. VIII. par. 13.

<sup>3</sup> Chap. VIII. par. 15.

<sup>4</sup> As to these, see Chap. III. pars. 4 and 6.

<sup>5</sup> Art. 36 of 1717, and sec. 14, Art. 5 of 1748. The consequences of employing

shall, on conviction thereof before a *general* court-martial, be sentenced to be cashiered.

77.<sup>1</sup> IF any soldier shall be drunk, whether on duty or not on duty, he shall, on conviction thereof before any court-martial, in addition to, or without any such other punishment as the court may award, be liable to a fine not exceeding one pound, to be levied by stoppages from the offender's daily pay.

IF any soldier shall be drunk, whether on duty or not on duty, his commanding officer may, with or without any other lawful punishment, award him to pay a fine not exceeding ten shillings, such fine to be levied by stoppages from the offender's daily pay. Any soldier who shall object to such award on the ground of his innocence of the offence shall, if he so request, have a right to be tried by a *district* or *garrison* court-martial instead of submitting to such fine.

IN levying any fine or fines for drunkenness, whether imposed by a court-martial or a commanding officer, the stoppages from the offender's daily pay shall in no case exceed fourpence a day.

78. A *regimental* or *detachment* court-martial may try any non-commissioned officer on a charge of drunkenness not on duty, but shall not try any other soldier on such charge.

IF any soldier shall be drunk when not on duty, and it shall appear expedient to the commanding officer that such soldier by reason of previous offences of drunkenness should be brought before a *district* or *garrison* court-martial, he shall make application to the general officer commanding the district or station, who shall, if he shall so think fit, make order for the trial of such soldier, and such soldier being convicted of the act of drunkenness shall be liable to such punishments as the court may award.

IN every case where a soldier is found guilty by a court-martial of drunkenness, whether on duty or not on duty, the court shall, for the purpose of assisting their discretion in awarding punishment, receive evidence of all former entries of drunkenness against the prisoner in the *regimental*, *company*, *battery*, or other defaulters book.

#### DISGRACEFUL CONDUCT.

79. ANY officer who shall behave in a scandalous manner, unbecoming the character of an officer and a gentleman ; —

a drunken Orderly of Dragoons in the Peninsula will occur to the readers of Napier. See also vol. iv. p. 386 of Despatches. These Acts were recast in 1869.

<sup>1</sup> As to stoppages of pay for this offence, see Lord Hardinge's Evidence, 'Military Punishments,' 1836, p. 303. Contrast with Arts. in 1870.

SHALL, on conviction thereof before a *general* court-martial, be CASHIERED.

80.<sup>1</sup> ANY officer or soldier, or other person employed in the War Department, or in any way concerned in the care or distribution of any money, provisions, forage, arms, ammunition, clothing, or other stores belonging to our army, or for our use, who shall embezzle, fraudulently misapply, wilfully damage, steal, or receive the same, knowing them to have been stolen, or shall be concerned therein, or connive thereat ; —

MAY, on conviction thereof before a *general* court-martial, be sentenced to *penal servitude* for any term of years not less than five, — or to such other punishment as shall accord with the provisions of the 17th section of the Mutiny Act ; — and on the trial of such offender, such court shall proceed in all particulars in accordance with the provisions of the said section ; —

AND such offender, on conviction thereof before a *district* or *garrison* court-martial, shall be liable to such punishments as the court may award.

81.<sup>2</sup> ANY soldier who shall malingering, feign, or produce disease or infirmity, — or shall wilfully do any act, — or wilfully disobey any orders, whether in hospital or otherwise, thereby producing or aggravating disease or infirmity, — or delaying his cure ; —

Or who SHALL

WILFULLY maim or injure himself or any other soldier, whether at the instance of such other soldier or not, or cause himself to be maimed or injured by any other person, [<sup>3</sup>with intent thereby to render himself or such other soldier unfit for service] ; —

Or who SHALL

TAMPER with his eyes, with intent thereby to render himself unfit for service ; —

Or who SHALL

STEAL any money or goods the property of a comrade, of a military officer, or of any military or regimental mess or band, or who shall receive any such money or goods knowing them to have been stolen ; — <sup>5</sup>

Or who SHALL

<sup>1</sup> Arts. 42 and 43 of 1717.

<sup>2</sup> Reframed in 1849.

<sup>3</sup> Inserted in 1850.

<sup>4</sup> Inserted in 1855, sec. 28 of Mutiny Act.

<sup>5</sup> See Chap. VII. par. 41.

STEAL or embezzle Government money or property, or shall receive the same knowing them to have been stolen or embezzled; —<sup>1</sup>

Or who SHALL

COMMIT any other offence of a felonious or fraudulent nature; —<sup>2</sup>

Or who SHALL

BE guilty of any other disgraceful conduct of a cruel, indecent, or unnatural kind; —

MAY, on conviction thereof before a *general*, *district*, or *garrison* court-martial, be sentenced to such punishments, other than death or penal servitude, as the court may award.<sup>3</sup>

82. ANY soldier, whether on or off duty, who shall become maimed or mutilated or injured, except by wounds received in action, shall be forthwith brought before a court of inquiry; <sup>4</sup> — and such court shall report their opinion whether such maiming or mutilating, or injuring was occasioned by design, and if the court shall report that the maiming or mutilating, or injuring was not occasioned by design, the soldier shall not be liable to be called to account in respect thereof; — but if the court shall report their opinion that such maiming or mutilating was occasioned by the designed and wilful act of such soldier, or by any other person at the instigation of such soldier, with intent on the part of such soldier to render himself unfit for the service, and not by accident, in that case the soldier shall be forthwith put upon his trial before a *general*, *district*, or *garrison* court-martial on a charge for *disgraceful* conduct, and such soldier shall not be discharged from our service (unless specially directed by our Commander-in-Chief to be discharged), but shall be retained, and employed on such duties or military work <sup>5</sup> as we may from time to time direct, through the Commander-in-Chief of our forces; — and the proceedings of such court of inquiry and of such court-martial shall be transmitted, through our Judge Advocate General, to our Commander-in-Chief, and afterwards by our Secretary of State for War to our Commissioners of Chelsea Hospital, in order that they may, when the case comes before them, have the best means of arriving at a just decision, either to grant or to withhold from such soldier a pension; — or

83.<sup>6</sup> ANY soldier who shall be convicted of having tampered with his eyes, with intent thereby to render himself unfit for service, —

<sup>1</sup> Inserted in 1862.

<sup>2</sup> See Chap. VII. par. 41.

<sup>3</sup> Recast in 1869.

<sup>4</sup> Chap. XII. par. 19.

<sup>5</sup> Chap. I. par. 23.

<sup>6</sup> Recast in 1849.

shall not be entitled to his discharge or to a pension; — but shall be detained in an eye infirmary or military hospital, or shall be sent to his parish, or dismissed, according to our directions given from time to time to our Commander-in-Chief.

#### FALSE RETURNS.

84. ANY officer who shall, through design or culpable neglect, omit or refuse to make or send a return or report; — or shall make a return or report, to us, to the Commander-in-Chief of our forces to our Secretary of State for War, or to any his superior officer, authorised to call for a return or report of the state of any regiment, troop or company, garrison or corps, under his command, knowing such return or report, or any statement therein, to be false; — or

85.<sup>1</sup> WHO shall make a false muster of man or horse, or shall knowingly allow or sign any muster roll, pay list, certificate, or return wherein such false statement is contained, or any duplicate thereof; — or who shall intentionally allow to be given any untrue documents, or conceal or omit the true facts directed to be stated, whereby to excuse any officer or soldier from muster or duty, by withholding the names of absent persons, or the true reasons and time of absence; — or

86. WHO shall, by any false statement, certificate, or document, or omission of the true statement attempt to obtain for any officer or soldier, or other person whatsoever, any pension, retirement, half pay, gratuity, sale of commission, exchange, transfer, or discharge; — or

87. ANY officer or soldier who shall make or be privy to the making of any false entry, alteration, or erasure in any account, description book, attestation, record, register, discharge, or other document, whereby the real services, causes of discharge or disability, wounds, conduct of, or sentences of courts-martial upon, any person whatsoever, shall not be truly given, or who shall wilfully omit to report or record any other facts relating thereto which it was his duty to have done in conformity with our regulations; — or

88.<sup>2</sup> WHO shall intentionally give in any false return or report or statement whatsoever of arms, ammunition, clothing, money, stores, or any provisions belonging to us, or for the use of our forces; — or who shall, by any false document, be concerned in

<sup>1</sup> Art. 24 of 1717.

<sup>2</sup> Arts. 42 and 43 of 1717, and sec. 13 of Art., 1748.

or connive at any fraudulent embezzlement of the stores aforesaid, or who shall, by producing any false certificates or vouchers or accounts, or in any other way, misapply the public money for purposes other than those for which it was intended ; — or

89. WHO shall, by any concealment or wilful omission, attempt to evade the true spirit and meaning of our orders and regulations relating to the foregoing points ; —

SHALL, if an *officer*, on conviction of any one of the aforesaid offences, before a *general* court-martial, be CASHIERED ; —

AND, if a *soldier*, shall, on conviction by a *general*, *district*, or *garrison* court-martial, be liable to suffer such punishments, other than death or penal servitude, as the court may award.

90. ANY officer who shall have signed certificates, returns, or forms of accounts in blank,<sup>1</sup> before the paymaster, quarter-master, or other person concerned in making up the said documents has inserted therein the whole of the circumstances for which the officer's signature is to be a voucher ; —

SHALL, on conviction thereof, be LIABLE to be CASHIERED, — or suffer such other punishment, according to the nature and degree of the offence, as by the judgment of a *general* court-martial may be awarded.

#### BILLETS AND CARRIAGES.

91.<sup>2</sup> ANY officer or soldier who shall demand billets for more than his effective men ; — or quarter wives and children or servants in houses, without the consent of the occupiers ; — or take money for freeing from billets ; —

SHALL, if an *officer*, on conviction thereof before a *general* court-martial, be CASHIERED ; — and, if a *soldier*, shall, on conviction thereof before a *general*, *district* or *garrison* court-martial, be liable to such punishments as shall accord with the provisions of the Mutiny Act and with the usage of our service.

92.<sup>3</sup> ANY officer or soldier who shall be guilty of any ill-treatment of landlords by violence, extortion, or making disturbances in billets ; — and any commanding officer who shall refuse or neglect to cause reparation to be made for such ill-treatment, after receiving proof of the justice of the complaint ; — and

93.<sup>4</sup> ANY officer commanding any corps or detachment who shall

<sup>1</sup> G. O. 17 Aug. 1812.

<sup>2</sup> 4 Will. & Mary, c. 13, s. 28 ; and Art. 31 of 1717, and sec. 9 of 1748.

<sup>3</sup> Art. 34 of 1717.

<sup>4</sup> Art. 30 of 1717.



not take care that his own quarters and billets, and those of all officers and soldiers under his command, be cleared, and the accounts regularly settled at the end of every four days, or before the troops shall quit their quarters, if they do not remain four days; — and

94.<sup>1</sup> ANY officer or soldier who shall permit carriages pressed for baggage to be overloaded, or shall permit the persons attending them to be ill-treated, or to be forced to take upon their carriages (except on emergencies as provided for by law) any women, or any soldiers, other than the sick and lame; — or who shall refuse to certify the sums due for carriages, and the name of the corps employing them; —

SHALL, if an *officer*, on conviction of any one of the aforesaid offences, be **LIABLE** to be **CASHIERED**, — or suffer such other punishment, according to the nature and degree of the offence, as by the judgment of a *general* court-martial may be awarded; — and if a *non-commissioned officer or soldier*, shall, on conviction of any of the aforesaid offences, be punished, according to the nature and degree of the offence, by a *general, district, garrison, regimental*, or other court-martial.

#### RECRUITING.

95. EVERY person subject to these articles who shall wilfully contravene any of the provisions of the Mutiny Act, or the regulations of the service, in any matter relating to the enlisting or attesting of recruits, may be tried for such offence before a *general, district*, or *garrison* court-martial, and be sentenced to such punishments, other than death or penal servitude, as such court may award.

#### MISCELLANEOUS OFFENCES.

96. ANY officer or soldier who, on application being made to him for that purpose, shall wilfully neglect or refuse to deliver over to the civil magistrate, — or to assist<sup>2</sup> in the apprehension of officers or soldiers accused of crimes punishable by law; — or

97. WHO shall protect any person from his creditors on the pretence of his being a soldier, — or who shall protect any soldier not actually doing duty as such in any manner not allowed by the Mutiny Act; —

<sup>1</sup> Art. 33 of 1717.

<sup>2</sup> Art. 18 of 1717. It is the common practice of all armies that, when a Soldier unknown has committed an outrage, whole Regiments are paraded to enable the complainant to point out the person against whom he complains. *Desp.*, vol. v. p. 408; vol. xiv. (Supp.) *Desp.* 373, G. O. 18 Aug. 1815: Chap. VII. p. 25, and Chap. VIII. par. 10. *Freer v. Marshall, ante.*

SHALL, if an *officer*, on conviction of any one of the aforesaid offences before a *general court-martial*, be CASHIERED ;—and, if a *soldier*, shall, on conviction thereof before a *general, district, or garrison court-martial*, be liable to such punishments as such courts may award.

98.<sup>1</sup> EVERY person subject to these Articles who shall fight or promote a duel, or take any steps thereto, or who shall not do his best to prevent a duel, shall,—if an officer, be liable to be CASHIERED, or to suffer such other punishments as a *general court-martial* may award ; — if other than an officer, shall be liable to such punishments as a *general, district, or garrison court-martial* may award.

99.<sup>2</sup> EVERY officer whose character or conduct as an officer and gentleman has been publicly impugned, shall within reasonable time submit the case to his commanding officer, or to other competent military authority for investigation, on pain of suffering such punishment as a *general court-martial* may award.

100. ANY officer or non-commissioned officer who shall strike or otherwise ill-treat any soldier ; — or

101.<sup>3</sup> ANY soldier who shall hire, or any officer or non-commissioned officer who shall connive at a soldier hiring, another person to do his duty for him ; — or

102.<sup>4</sup> ANY soldier who shall pawn, sell, lose by neglect, make away with, or wilfully spoil his arms, accoutrements, or necessities, —or any extra article of clothing or equipment that he may have been put in possession of and ordered to wear, on the recommendation of the surgeon, for the benefit of his health ; or spoil or wilfully deface or make away with or pawn his medal granted him for service in the field, or for general good conduct by our order, or by order of the late East India Company ;—or sell, lose by neglect, make away with, or ill-treat his horse ; — or

103.<sup>5</sup> ANY officer or soldier who shall commit any waste or spoil, either in walks of trees, parks, warrens, fishponds, houses, or

<sup>1</sup> Art. 20 of 1717, and remodelled in 1862 (Art. 102). In 1748, the person using provoking speech or gesture was to ask pardon in the presence of the Commanding Officer. See the Debate on this Article in 1844. 73 H. D. (3), p. 762 ; and W. O. Cir., 18 April 1844.

<sup>2</sup> Inserted in 1862 (Art. 103).

<sup>3</sup> Art. 38 of 1717 ; and sec. 14, Art. 7 of 1748.

<sup>4</sup> Arts. 42 and 43 of 1717.

<sup>5</sup> This was inserted in the Articles of 1685 as to Rebels. Art. 30 of 1717 ; and sec. 14, Art. 16 of 1748. The power of the Commander-in-Chief under this Article assumes a state of Rebellion to exist. Is such a power now needed ? Chap. IV. par. 9.

gardens, vineyards, olive groves, corn fields, enclosures, or meadows; — or shall maliciously destroy any property; — whether belonging to our own subjects, or to inhabitants of other countries; — unless the destruction of property shall be ordered by the Commander-in-Chief of our forces, to annoy rebels<sup>1</sup> or other enemies in arms against us; —

SHALL, if an *officer*, on conviction of any one of the aforesaid offences, be LIABLE to be CASHIERED,—or suffer such other punishment, according to the nature and degree of the offence, as by the judgment of a *general* court-martial may be awarded; — and, if a *non-commissioned officer or soldier*, shall, on conviction of any of the aforesaid offences, be punished, according to the nature and degree of the offence, by a *general, district, garrison, regimental*, or other court-martial.

104.<sup>2</sup> IF any person subject to the Mutiny Act attempt to commit suicide, he shall be liable to be tried by a court-martial; — and, upon conviction, he shall be liable, if an officer, to be cashiered, and, if a soldier, to suffer imprisonment, with or without hard labour.

105.<sup>3</sup> AND all crimes not capital,—and all acts, conduct, disorders, and neglects,—which officers and soldiers, and other persons subject to these our Articles of War, may be guilty of, to the prejudice of good order and military discipline,—though not specified in the foregoing cases, or in these our Articles of War,—shall be taken cognizance of by courts-martial, according to the nature and degree of the offence, and the offender shall suffer such punishment as the court may award.

### SECTION III.

#### COURTS-MARTIAL.

##### COMPOSITION OF COURTS-MARTIAL.

106.<sup>4</sup> A *general* court-martial, if convened in the United Kingdom, the East Indies, Malta, or Gibraltar, shall consist of not less than *nine*,—if convened in Nova Scotia or Bermuda, of not less than

<sup>1</sup> See note <sup>5</sup>, p. 279.

<sup>2</sup> Inserted in 1866.

<sup>3</sup> The Devil's Article, according to Lord Hardinge. *Military Punishments* 1836, p. 297. It was not in recent Articles prior to 1748 (see sec. 20, Art. 3).

<sup>4</sup> Sec. 15, Art. 2 of 1748. By 21 Geo. II. c. 6, s. 4, three Officers had jurisdiction, and Arts. of 1870.

*seven*,—and if convened in any other colony, or in any place beyond our dominions, of not less than *five* commissioned officers, [each of whom shall have held a commission for three years before the assembling of the court<sup>1</sup>]. No field officer shall be tried by any person under the degree of a captain.

107. ANY officer commanding any detachment or portion of our troops, which may at any time be serving in any place beyond seas where it may be found impracticable<sup>2</sup> to assemble a general court-martial, upon complaint made to him of any offence committed against the property or person of any inhabitant of or resident in any such countries by any person serving with or belonging to our armies, under his immediate command, may assemble a *detachment general* court-martial of not less than *three* commissioned officers of any corps to try any such person, notwithstanding any such officer shall not have received any warrant empowering him to assemble courts-martial.

108.<sup>3</sup> A *district* or *garrison* court-martial, if convened in the United Kingdom, the East Indies, Malta, or Gibraltar, shall consist of not less than *seven*,—if convened in Nova Scotia or Bermuda, of not less than *five*,—and if convened in any other colony, or in any place beyond our dominions, of not less than *three* commissioned officers.

109. EVERY *district* or *garrison* court-martial may be composed of any officers of different corps, and of officers of our Royal Artillery, and Engineers, and Royal Marines, and of officers of the general staff, whose appointments have been duly notified in general or garrison orders, provided such officers are in the receipt of their full pay on the staff, and are themselves amenable to military law, although on the half pay of their regimental rank; — or, except for the trial of warrant officers, may be entirely composed of officers of the same regiment, assembled by order of the senior officer on the spot.

110. EVERY *district* or *garrison* court-martial shall be assembled in conformity with the orders of the officer under whose command the corps is placed, who will previously regulate the holding of courts-martial within his command, delegating or withholding the power to commanding officers to convene *district* or *garrison* courts-martial as he may deem to be most expedient, or as our commander of the forces may direct.

<sup>1</sup> Added in 1868, and the number of members reduced.

<sup>2</sup> Note on sec. 10 of Mutiny Act, *ante*.

<sup>3</sup> See 1

111. A warrant-officer<sup>1</sup> may be tried by a *district* court-martial, to be appointed by the general officer commanding our forces in the district where the corps shall be situated, if in the United Kingdom, and if elsewhere, by the officer commanding in chief on the station; — and such court-martial, if convened in Bermuda, the Bahamas, the Cape of Good Hope, the settlements in southern or the western coast of Africa, Saint Helena, British Columbia, Vancouver's Island, Jamaica, Honduras, Newfoundland, New Zealand, the Australian colonies, the Windward and Leeward Islands, British Guiana, Hong Kong, the Prince of Wales Island, Singapore, Malacca, or in the settlements on the coast of China, or in the East Indies, may consist of five, and if convened elsewhere shall consist of not less than seven, commissioned officers, and of such officers not more than *two* shall be taken from the regiment in which the warrant officer to be tried is serving; — and no more than *two* of the members shall be under the degree of a captain.

112. THE commissioned officers of every regiment, battalion, [brigade<sup>2</sup>] or regimental depôt, or of a detachment of ordnance corps, or of the Army Service Corps, commanded by an officer not under the rank of captain, may, by the appointment of their colonel or commanding officer, without other authority than these our Rules and Articles of War, hold *regimental*<sup>3</sup> courts-martial consisting of not less than *five* officers (unless it be found impracticable<sup>3</sup> to assemble that number, when *three* shall be sufficient); — and may inquire into such disputes or criminal matters as may come before them; — and the commanding officer shall in no case be a member of such court.

<sup>4</sup> WHEN any portion of a regiment or battalion is attached for duty to another regiment or battalion, the officers and men of both such regiments or battalions shall be deemed to belong to one and the same regiment for all purposes of trials by regimental court-martial.

113. THE commissioned officers of any detachment or portion of our troops, which may at any time be serving in any part of our dominions, or elsewhere, or may be embarked on board a transport ship, convict ship, merchant vessel, or troop ship not in commission, although such detachment or portion of our troops shall consist of men from different regiments, may, by the appointment of the senior officer in command of the detachment, district, station,

<sup>1</sup> Formerly these were applied by the Board of Ordnance (by Warrant), Vol. I. p. 8.

<sup>2</sup> Added in 1873.

<sup>3</sup> Chap. IV. par. 22.

<sup>4</sup> Added in 1870, and amended in 1873.

garrison, barrack, island, or colony, provided he be not under the rank of a captain, or in case such troops shall be on board any transport ship, convict ship, merchant vessel, or troop ship not in commission, by the appointment of the senior officer on board, whatever be his rank, without any other authority than these our Articles of War, hold *detachment* courts-martial, within our dominions, or elsewhere, consisting of not less than five officers (unless it be found impracticable<sup>1</sup> to assemble that number, when three shall be sufficient); — and may inquire into such disputes or criminal matters as may come before them, according to the rules and limitations observed by *regimental* courts-martial.

114. THE president of every court-martial shall be appointed by or under the authority of the officer convening such court,<sup>2</sup> and shall in no case be [the confirming<sup>3</sup> officer, or the officer whose duty it has been to investigate the charges on which the prisoner is to be arraigned];<sup>4</sup> — nor in the case of a general court-martial, or of a district court-martial for the trial of a warrant officer, under the degree of a field officer, unless a field officer cannot be had; — nor in any case whatever under the degree of a captain, save in the case of a detachment general court-martial, or of a regimental or detachment court-martial holden on the line of march, or on board any transport ship, convict ship, merchant vessel, or troop ship not in commission, or at any place where a captain cannot be had: —

IN the case<sup>3</sup> of a detachment general court-martial, the officer convening such court may be the president thereof.

115. A *general* court-martial may sentence any officer or soldier to suffer death, penal servitude, imprisonment, forfeiture of pay or pension, or any other punishment which shall accord with the usage of the service.

116. NO sentence of *death* shall pass without the concurrence of *two thirds* at the least of the officers present. — No sentence of penal servitude shall be for a period of less than five years; and no sentence of imprisonment shall be for a period longer than two years.

117. NO court-martial, other than a *general* court-martial, or a *detachment general* court-martial having the same powers as a general court-martial, shall have power to pass any sentence of death or penal servitude.

<sup>1</sup> Note on sec. 10 of Mutiny Act, *ante*.

<sup>2</sup> Inserted in sec. 13 of Mutiny Act, 1854.

<sup>4</sup> Chap. II. par. 71; Chap. IX. par. 12.

<sup>3</sup> Art. 77 of 1844.

ANY *general, district, or garrison* court-martial may, in addition to any other punishment which such court may award, sentence any offender to all or any of the following forfeitures:

To forfeit absolutely or for any period not less than eighteen months any good-conduct badge or any good-conduct pay which such offender may have earned by past service:

To forfeit any annuity, gratuity, medal, or decoration which may have been granted to him:

To forfeit any advantage as to pension which he may have earned by past service:

To forfeit all right to good-conduct pay and to pension on discharge, whether in respect of past or future service:

Such court may also, in addition to any other lawful punishment, sentence any offender to be discharged from our service with ignominy.

\*118. NO court-martial shall, for any offence whatever during a time of peace within the Queen's dominions, have power to sentence any soldier to corporal punishment; provided that any court-martial may sentence any soldier to corporal punishment while on active service in the field or on board any ship not in commission, for mutiny, insubordination, desertion, drunkenness on duty or on the line of march, disgraceful conduct, or any breach of the Articles of War; and no sentence of corporal punishment shall exceed fifty lashes.<sup>1</sup>

\*119. A *general, district or garrison* court-martial may, in addition to any sentence of corporal punishment, award imprisonment, with or without hard labour, and with or without solitary confinement.

120. ANY confirming officer may commute a sentence of corporal punishment to imprisonment for any period not exceeding forty-two days, with or without hard labour and with or without solitary confinement; — or may mitigate it, either by reducing the number of lashes, or by awarding, instead of such sentence, an imprisonment for any period not exceeding twenty days, with or without hard labour, and with or without solitary confinement, and corporal punishment to be inflicted in the prison, not exceeding twenty-five lashes.

THE solitary confinement awarded in commutation of a sentence of corporal punishment shall in no case exceed seven days at a time, with intervals of not less than seven days between each period of such confinement.

121. WHEN any court-martial shall award a sentence of im-

<sup>1</sup> See Art. 1867, Chap. II. par. 10, and Art. 1868.

prisonment, and shall direct that such imprisonment shall be solitary confinement only, the period of such solitary confinement shall in no case exceed fourteen days.<sup>1</sup>

122. IN situations in which it may be impracticable to put in execution sentences of solitary confinement, the convening officer will give the court instructions to that effect, and the court in awarding a sentence of imprisonment is hereby directed to have regard to such instructions.<sup>2</sup>

123. NO sentence of a *general* court-martial shall be put in execution till after a report shall have been made of the whole proceedings to us;<sup>3</sup> — or to the officer commanding in chief; — or to some other person duly authorized by us, under our sign manual, [or <sup>4</sup> by warrant granted in pursuance of authority under our sign manual,] to confirm the same, and until our or his directions shall have been signified thereupon; — [and <sup>5</sup> no sentence of death shall be carried into effect in any of our colonial possessions until it shall have been approved in our behalf by the civil governor or person administering the civil government.]

124. A *detachment general* court-martial shall have the same powers in regard to sentence upon offenders as a *general* court-martial; — but no sentence of a *detachment general* court-martial shall be executed until the general commanding the army of which the division, brigade, detachment, or party forms part, and to which any person so tried, convicted, and adjudged shall belong, shall have approved and confirmed the same.

125. A *general* court-martial may sentence a commissioned officer to loss of army or regimental rank, in addition to any reprimand or other punishment which it may award, by reducing him, if under the rank and degree of a field officer, to the bottom of or to any other place on the list of the regimental rank in which he may be serving; — or if a superior officer, to the last or any other place on the list of the army rank in which he may be serving; — and in all cases where the officer so sentenced to loss of rank holds army as well as regimental ranks, the loss of rank may be inflicted in either or both of those ranks; — and such court may sentence such officer to be imprisoned, with or without hard labour, in any case in which the court shall be authorized by law, and shall deem it

<sup>1</sup> Art. 124 of 1860.

<sup>2</sup> Art. 125 of 1860.

<sup>3</sup> This was the 52nd Article of William III.'s Articles of War; and see Article 20 of 1742. Chap. X. pars. 18 and 29.

<sup>4</sup> Added in 1811.

<sup>5</sup> This was added in 1855. It did not then, and does not now, Chap. IX. par. 29.



necessary, to adjudge such punishment; — but it shall not have power to sentence such officer to be suspended from doing duty, or from pay.<sup>1</sup> With respect to officers of our Indian staff corps, a general court-martial may sentence any such officer to forfeit all or any part of his army or staff service, or all or any part of both.

\*126. A *general*, *district*, or *garrison* court-martial may sentence any soldier to imprisonment, with or without hard labour, and may also direct that such offender shall be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding fourteen days at a time nor eighty-four days in any one period of three hundred and thirty-six days, with intervals between the periods of solitary confinement of not less duration than such periods of solitary confinement; — and when the imprisonment awarded shall exceed eighty-four days, the court shall expressly order that the solitary confinement shall not exceed seven days in any twenty-eight days of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

\*127. NO sentence of a *district* or *garrison* court-martial shall be put in execution till it has been confirmed by the general officer, governor, or senior officer in command of the district, garrison, island, or colony.

128.<sup>2</sup> A warrant officer may be tried by a *district* or *garrison* court-martial, and may be sentenced to be dismissed from the service, or to be suspended from rank and pay and allowances for any stated period, or to be reduced to the bottom or any other place in the list of the rank which he may hold, or to be reduced to an inferior class of warrant officer, or, if he was originally enlisted as a private soldier, and continued in the service until his appointment to be a warrant officer, to be reduced to the rank of a private soldier,<sup>3</sup> or to be remanded to regimental duty in the rank held by him immediately before his appointment to be a warrant officer.

<sup>2</sup> A warrant officer may be sentenced by a *general* court-martial to these and to such other punishments as such court is competent to award.

<sup>2</sup> A warrant officer shall in no case be liable to corporal punishment.

<sup>4</sup> THE government of any of the presidencies in India may reduce any warrant officer serving in or belonging to such presidency to a

<sup>1</sup> Added in 1869.

<sup>2</sup> Recast in 1857 and in 1862.

<sup>3</sup> Inserted in 1871.

<sup>4</sup> Added in 1866.

lower grade of warrant rank, or may remand any such warrant officer to regimental duty in the rank held by him immediately previous to his appointment to be a warrant officer.

<sup>1</sup> A hospital apprentice in India may be sentenced by a *general*, *district* or *garrison* court-martial to be suspended from rank and pay and allowances for a stated period, or to be reduced to the lowest or any other place in the list of hospital apprentices, or to both of these punishments in conjunction, or to be dismissed from the service.

\*129. A *regimental* or *detachment* court-martial may sentence any soldier to imprisonment, with or without hard labour for any period not exceeding forty-two days, and may also direct that such soldier may be kept in solitary confinement, for any portion or portions of such imprisonment, not exceeding fourteen days at a time, with an interval between them of not less duration than such period of solitary confinement; —but no sentence shall be executed until the commanding officer shall have confirmed the same;<sup>2</sup> nor shall any sentence of a *detachment* court-martial having the same powers only as a *regimental* court-martial be executed, until the superior officer on the spot, not being a member of the court, shall have confirmed the same.

\*130.<sup>3</sup> IN addition to any other punishment which the court may award, a court-martial may further sentence any offender to be put under stoppages of pay until he shall have made good —

Any money or articles issued to him in respect of his fraudulent enlistment, or by reason of any fraudulent misrepresentation or concealment on his part :

Any loss or damage occasioned by him in any instance of disgraceful conduct :

Any loss or destruction of, or damage or injury to, any property whatsoever, occasioned by his wilful or negligent misconduct :

Any medal or decoration for service in the field or for general good conduct which may have been granted to him by our order, or any medal or decoration which may have been granted to him by any foreign power, which medal or medals he may have been authorized to wear, and may have made away with or pawned :

Any loss, destruction, or damage of his horse, arms, clothing, instruments, equipments, accoutrements, or regimental necessities; — or of those of any officer or soldier; — or of any extra article of clothing of equipment that he or any other

<sup>1</sup> Added in 1869.

<sup>2</sup> Chap. IV. par. 22.

<sup>3</sup> This Art. was recast in 1849 and 1860.

soldier may have been put in possession of and ordered to wear on the recommendation of the surgeon :

Any expense necessarily incurred by his drunkenness or other misconduct.

\*131.<sup>1</sup> EXCEPT in the case of the loss, destruction, or damage of any arms, clothing, instruments, equipments, accoutrements, or regimental necessities, in which case the court may by its sentence direct that the said stoppages shall continue till the cost of replacing the same be made good, the amount of any loss, destruction, damage, or expense shall be ascertained by evidence, and the offender shall be placed under stoppages for such an amount only as shall be proved to the satisfaction of the court.

\*132.<sup>2</sup> SO much only of the pay of the soldier may be stopped and applied as shall, after satisfying the charges for messing and washing, leave him a residue of at the least one penny a day.

133.<sup>3</sup> WHEN an offender is put under stoppages for making away with or pawning any medal or decoration, the amount shall be credited to the public, but the medal or decoration in question shall not be replaced except under special circumstances, to be determined by the Commander-in-Chief, with the concurrence of our Secretary of State for War.

134. WHEN any person subject to these articles has been sentenced by a court-martial to stoppages of pay, it shall be lawful for our Commander-in-Chief, with the concurrence of our Secretary of State for War, or for the Commander-in-Chief in India with the concurrence of the Government of India, and for the Commander-in-Chief in each of the Presidencies in India with the concurrence of the Local Government to remit the whole or any portion of such stoppages in any case where such remission may appear to be conducive to the good of our service.

\*135. IN case of mutiny or insubordination [accompanied<sup>4</sup> with personal violence], or other offences committed on the line of march, or on board any transport ship, convict ship, merchant vessel, or troop ship not in commission, the offender may be tried by a *regimental* or *detachment* court-martial, and the sentence confirmed and carried into execution on the spot by the officer in the immediate command of the troops, not being a member of the court ; —

<sup>1</sup> This Art. was recast in 1849 and 1860.

<sup>2</sup> Prior to 1847 the stoppages were not to exceed two-thirds of his pay, but this limit was adopted in this year (Art. 122).

<sup>3</sup> Inserted in sec. 33 of Mutiny Act, 1858.

<sup>4</sup> Inserted in 1867.

but the sentence shall not exceed that which a regimental court-martial is competent to award; — and any sentence, so confirmed, shall be noticed in the monthly return of courts-martial sent in to our adjutant-general, and, if on the line of march, reported to the general commanding.

\*136. NO *regimental* court-martial shall try any soldier for absence [without leave, if the absence has exceeded the period of *twenty-one days*, without<sup>1</sup> the permission of the general or other officer commanding the brigade, district, or garrison]; — nor shall try any soldier for desertion.

\*137.<sup>2</sup> A *non-commissioned officer* not being an army schoolmaster may be reduced to the ranks by the sentence of a *regimental* or other court-martial; — or by the order of the Commander-in-Chief, or the colonel, or in the militia the appointed commandant, of the regiment or corps.<sup>3</sup> — [An army<sup>4</sup> schoolmaster may be sentenced to dismissal or loss of service, but not to reduction.] — The words Commander-in-Chief in this article shall include the Commander-in-Chief of our forces in India, and the Commander-in-Chief of our forces in each of the presidencies in India.

138.<sup>5</sup> WHENEVER sentence shall be passed by a court-martial on an offender already under sentence, either of imprisonment or penal servitude, the court may award sentence of imprisonment or penal servitude for the offence for which he is under trial to commence at the expiration of the imprisonment or penal servitude to which he shall have been so previously sentenced, although the aggregate of the terms of imprisonment or penal servitude respectively may exceed the term for which any of those punishments could otherwise be awarded.<sup>6</sup>

,<sup>7</sup> WHENEVER Her Majesty, or any general or other officer

<sup>1</sup> Compare Art. 126 of 1847 with Art. 48 of 1860.

<sup>2</sup> This reduction abroad was the subject of *Barwis v. Keppel*, 2 Wil. Rep. p. 314. Art. 27 of 1717; and sec. 15. par. 16 of 1748, related to it. The Mutiny Act, 1746, sec. 30, gave the power to a Regimental Court only; by section 16 of 1748 the Colonel also had the power—but not the C. O. for the time being, after Circular 442 of 27 Dec. 1826. In 1830 the power was given by section 74 to H. M. through the Commander-in-Chief; and in 1854 and 1855 alterations were made, as seen by comparing section 127 in each Act. Vol. I. p. 28.

<sup>3</sup> A Sergeant-Major would be reduced if ordered to serve as a Sergeant. See *Ginger's case* (1802), 1 M.Ar. pp. 361–6.

<sup>4</sup> Inserted in sec. 33 of Mutiny Act, 1858.

<sup>5</sup> Inserted as 141-2 of 1860.

<sup>6</sup> Under G. O. 91 of 1872, the Court in passing such a sentence of penal servitude, is to specify the date of commitment by evidence of the date of the expiration of the prior sentence.

<sup>7</sup> Inserted in 1869.

authorized to confirm the sentences of courts-martial, shall commute a sentence of penal servitude or corporal punishment to imprisonment, and the offender whose sentence shall be so commuted shall at the time of such commutation be under sentence of imprisonment or penal servitude, it shall be lawful for Her Majesty, or the general or other officer who shall so commute such sentence, to direct that such commuted sentence of imprisonment shall commence at the expiration of the imprisonment or penal servitude to which such prisoner shall have been so previously sentenced, although the aggregate of the term of imprisonment or penal servitude respectively may exceed the term for which any of those punishments could be otherwise awarded.

139.<sup>1</sup> EXCEPT in the cases mentioned in the preceding article, every term of penal servitude, or of imprisonment under the sentence of a court-martial, whether original or revised, shall be reckoned as commencing on the day on which the original sentence and proceedings shall be signed by the president :<sup>2</sup> — The place of imprisonment under the sentence of *general* courts-martial shall be appointed by the officer commanding the district, garrison, island, or colony in which the court may be held ;<sup>3</sup> — and under the sentence of any other court-martial, shall be appointed by the officer confirming the proceedings of such court-martial ; — and in default of such appointment, then the place of imprisonment shall be appointed by the officer commanding the regiment or corps to which the prisoner belongs or is attached.

\*140.<sup>4</sup> NO commanding officer shall, by giving in against a prisoner vague and indefinite charges, try before a *regimental* court-martial grave offences, which are directed to be tried by *general*, *district*, or *garrison* courts-martial ; — BUT as it may be advisable that some of the foregoing offences, which in certain cases may admit of less serious notice, should be tried by *district*, *garrison*, *regimental*, or *detachment* courts-martial,—in such cases the officer commanding the battalion, corps, or detachment, who may deem it advisable so to proceed, shall lay a statement of the case, together with the charge he intends to bring, before the general or other officer commanding the brigade, district, or garrison, with an application so to proceed. — The general or superior officer will exercise his discretion in directing the description of court by which the offender shall be tried, but the permission to try grave offences by a *district*,

<sup>1</sup> Inserted as 141-2 of 1860.

<sup>2</sup> Chap. IX. par. 72.

<sup>3</sup> Chap. X. par. 19.

<sup>4</sup> Inserted as 91 Art. of 1829 ; and Chap. VI. par. 6.

*garrison, regimental, or detachment court-martial* shall be recorded<sup>1</sup> in the heading of the proceedings of such court as well as noticed in the monthly return of courts-martial sent in to our adjutant-general.

141. IN all places other than the United Kingdom or British Isles, whenever the punishment of death shall have been awarded by a *general* or a *detachment general* court-martial, the officer commanding in chief Her Majesty's forces there serving, instead of causing such sentence to be carried into execution, may order the offender to be kept in penal servitude for any term not less than five years, or to suffer such term of imprisonment, with or without hard labour, and with or without solitary confinement, such solitary confinement not exceeding the periods prescribed in the 126th article, as shall seem meet to the officer commanding as aforesaid.

142. IN all places other than the United Kingdom or British Isles, whenever a sentence of penal servitude shall have been awarded by a *general* or *detachment general* court-martial, the officer commanding in chief Her Majesty's forces there serving, instead of causing such sentence to be carried into execution, may order the offender to suffer imprisonment (with or without hard labour, and with or without solitary confinement, such solitary confinement not exceeding the periods prescribed in the 126th article), for such term not exceeding two years as shall seem meet to the officer commanding as aforesaid.

TRIAL OF CIVIL OFFENCES BY COURT-MARTIAL IN PLACES  
WITHIN OUR DOMINIONS BEYOND SEAS, OTHER THAN  
THE EAST INDIES, WHERE THERE IS NO CIVIL JUDICA-  
TURE.

143.<sup>2</sup> ANY officer or soldier who may be serving in any place within our dominions beyond the seas (excepting India), where there is no civil judicature in force, by our appointment, or under our authority, competent to try such offenders, or who may be serving in our garrison of Gibraltar, and who shall be accused of treason, or of any other civil offence, which, if committed in England, would be punishable by a court of ordinary criminal jurisdiction, and not by a court-martial, shall be tried by a *general* court-martial appointed by the officer commanding in chief in such place as aforesaid for the time being; — and if found guilty, shall be liable, in the case of an offence which, if committed in

<sup>1</sup> Inserted in 1844, Art. 82.

<sup>2</sup> Art. 46 of 1717. In America the offenders were to be held in custody till charged before a Civil Magistrate. 5 Geo. III. c. 33. *Rex v. Suddis*, 1 East. Rep. p. 317. Amended in 1856 (Art. 130).

England, would be capital, to suffer DEATH, or such other punishment as by the sentence of such *general* court-martial shall be awarded; — and in the case of any other offence, to suffer such punishment other than death as by the sentence of such *general* court-martial shall be awarded; — no such punishment, nevertheless, to be of such a nature as shall be contrary to the usages of English law in regard to the punishment of offenders, or to be carried into effect until such officer commanding in chief as aforesaid shall have confirmed the same; — and in all cases where such court-martial shall have convicted any such officer or soldier of any offence punishable with death, it shall be lawful for such court-martial, instead of sentencing the offender to death, to adjudge him to be kept in penal servitude for a term of not less than five years; — and we hereby reserve to ourselves the power, in all cases where a sentence of death shall have been pronounced on any officer or soldier by any general court-martial as aforesaid, instead of causing such sentence to be carried into execution, to order the offender to be kept in penal servitude, or to be imprisoned, with or without hard labour, for such period of time as, on consideration of all the circumstances of the case, shall seem to us to be most just and fitting.

#### TRIAL OF CIVIL OFFENCES IN THE EAST INDIES.

144. [See Mutiny Act, Section 101.]

#### TRIAL OF CIVIL OFFENCES IN PLACES OUT OF OUR DOMINIONS.

145. ANY officer or soldier who may be serving with our forces out of our dominions, who shall be accused of treason, or of any other civil offence which, if committed in England, would be punishable by a court of ordinary criminal jurisdiction,<sup>1</sup> and not by a court-martial, shall be tried by a general court-martial, appointed by the general or other officer having power to appoint courts-martial in such place for the time being, and if found guilty shall be liable, in the case of an offence which, if committed in England, would be capital, to suffer death, or such other punishment as by the sentence of such general court-martial shall be awarded; — and in the case of any other offence to suffer such punishment other than death as by the sentence of such general court-martial shall be awarded; — no such punishment, nevertheless, to be of such a nature as shall be contrary to the usages of

<sup>1</sup> Chap. VII. pars. 22, 39. Amended in 1856 (Art. 132).

English law<sup>1</sup> in regard to the punishment of offenders, or to be carried into effect until confirmed by the general or other officer by whom or under whose authority such court-martial was appointed; — and in all cases where such court-martial shall have convicted any such officer or soldier of any offence punishable with death, it shall be lawful for such court-martial, instead of sentencing such offender to death, to adjudge him to be kept in penal servitude for a term of not less than five years; — and in all cases where such court-martial shall sentence any officer or soldier to death, it shall be lawful for the general or other officer commanding our said forces in chief, by whose authority from us such court-martial was assembled, instead of causing such sentence to be carried into execution, to order such officer or soldier to be kept in penal servitude, or to be imprisoned, with or without hard labour, for such period of time not exceeding two years as to him shall seem meet: — And in the case of a commissioned officer no sentence of death or penal servitude shall be carried into effect until confirmed by the officer commanding in chief the said forces. — But as it may be expedient to hold detachment general courts-martial for the trial of such of the civil offences aforesaid as are provided for in the 12th section of the Mutiny Act, the provisions of this article shall not be deemed to affect the jurisdiction of detachment general courts-martial in such cases; — and those courts shall in such cases have the same powers as are granted by this article to general courts-martial; — and the general or other officer commanding our said forces in chief as aforesaid shall have the same powers as regards detachment general courts-martial as are conferred on him by this article in regard to general courts-martial.

#### MIXTURE OF OFFICERS.<sup>2</sup>

146. WHERE it is necessary or expedient, a court-martial, composed exclusively of officers of our army, or of officers of our royal marines, or of officers of both those services, whether the commanding officer by whose order such court-martial is assembled belongs to our land or to our marine forces,<sup>3</sup> may try a person belonging to either of these services. — When the person to be

<sup>1</sup> Chap. IX. par. 70, and G. O. of 12th December 1807 (Hough, 1825) p. 694.

<sup>2</sup> Recast in the Mutiny Act of 1859 as Sec. 12, and in the Arts. of War of 1861, and see Sec. 13 of the M. M. Act.

<sup>3</sup> By 5 Geo. III. c. 7, s. 77, the Royal Marines were to sit in order of date of their Commissions; and by 26 Geo. III. c. 10, s. 80, the Officers of the E. Co. were joined in Court-martial duty.



tried shall belong to our army, then the proceedings of such court shall be regulated as if the court were composed of officers of our army only, and the provisions of the Mutiny Act and Articles of War for our army shall be applicable to the proceedings of such court: — When the person to be tried shall belong to our royal marines, then the proceedings of such court shall be regulated as if the court were composed of officers of our land forces only, except that the provisions of such Act and Articles of War as shall be in force for the regulation of our royal marine forces while on shore shall be applicable.

147.<sup>1</sup> IT is our will and pleasure that *general courts-martial* upon officers and soldiers of our regiments of life guards or horse guards, for differences arising purely among themselves, or for crimes relating to discipline or breach of orders, shall be composed of officers serving in any or all of those corps (as they may be most conveniently assembled), and they are to take rank according to their commissions.

IN like manner also, the officers of our three regiments of foot guards shall, for similar purposes, of themselves compose *courts-martial*, and take rank according to their commissions.

148. ALL *courts-martial* arising out of disputes between our life guards or horse guards and our foot guards, or between either of those corps of guards and any of our other forces, or different corps of our other forces, shall be equally composed of officers belonging to the corps in which the parties complaining and complained of do then serve; — and the president shall be taken by turns as nearly as our service will with convenience admit, beginning first by an officer of one of our regiments of life guards, and so on in course out of the other corps, according to the seniority in rank of such corps respectively.

149.<sup>2</sup> WHEN any proportion of our regiments of life guards, horse guards, or foot guards shall be serving on detached duty, offenders belonging thereto shall be tried by *courts-martial* to be assembled by any governor or commander of a district, garrison, fort, castle, or barrack, and to be composed of officers of different corps, provided that no less than a moiety of the officers shall belong to our life guards, horse guards, or foot guards respectively. if<sup>3</sup> so many are on the same duty, or can be conveniently assembled.

<sup>1</sup> Sec. 15, Art. 3 of 1748.

<sup>2</sup> Inserted in 1817.

<sup>3</sup> Upon which the decision of the convening authority is accepted as final. J. A. Arabin, 25th Sept. 1839.

150.<sup>1</sup> THE officers of artillery shall, for differences arising amongst themselves, or in matters relating solely to their own corps, have courts-martial composed of their own officers ; — but where a sufficient number of such officers cannot be assembled, or in matters wherein other corps are interested, they shall sit in courts-martial with the officers of our other corps, taking rank according to their commissions.

151. NO officer serving in the militia shall sit in any court-martial upon the trial of any officer or soldier serving in any of our other forces ; — nor shall any officer in our other forces sit in any court-martial upon the trial of any officer or soldier serving in the militia.<sup>2</sup>

#### PROCEEDINGS.

152. IN all trials by courts-martial, as soon as the president and other officers appointed to serve thereon shall be assembled, their names shall be read over in the hearing of the prisoner, who shall thereupon be asked if he objects to being tried by the president or by any of such officers<sup>3</sup> ; — and if the prisoner shall then object to the president, such objection, unless disallowed by two thirds at least of the other officers appointed to form the court, shall be referred to the decision of the authority by whom such president shall have been appointed ; — but if he object to any officer other than the president, such objection shall be decided by the president and the other officers appointed to form the court ; — and when the place of the president or other officer in respect of whom any challenge shall have been made and allowed shall be supplied by some officer in respect of whom no challenge shall have been made or allowed, or if no challenge shall have been made, or if made not allowed, the president and other officers composing a general court-martial shall take the following oath before the judge advocate<sup>4</sup> or person officiating as such ; — and on trials by other courts-martial the same oath shall be administered by the president to the other members ; — and afterwards by any sworn member to the president :

<sup>1</sup> Sec. 19, Art. 2 of 1748.

<sup>2</sup> When the Militia were made liable to the Mutiny Act, this was first enacted (see 30 Geo. II. c. 25, s. 47, and re-enacted in 1802 by sec. 15 of 42 Geo. III. c. 90. In 1803, the section was inserted in the Articles of War. The rule is broken in upon by Section 3 of 36 & 37 Vic. c. 68.

<sup>3</sup> This right of challenge was secured to the Prisoner in 1847. Chap. IX. par. 15.

<sup>4</sup> Art. 22 of 1717. By Art. 20 of 1712 the Judge Advocate General was to inform and prosecute ; and by sec. 15, Art. 6 of 1748, to prosecute in *his* name.

*YOU shall well and truly try and determine according to the evidence in the matter now before you.*<sup>1</sup>

*So help you GOD.*

*You shall duly administer justice, according to the rules and articles for the better government of Her Majesty's forces, and according to an Act now in force for the punishment of mutiny and desertion, and other crimes therein mentioned, without partiality, favour, or affection; <sup>2</sup> and if any doubt shall arise, which is not explained by the said Articles or Act, then according to your conscience, the best of your understanding, and the custom of war in the like cases: And you shall not divulge <sup>3</sup> the sentence of the court until it shall be duly approved; neither shall you upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, or a court-martial, in due course of law.*

*So help you GOD.*

AND as soon as the said oaths shall have been administered to the respective members, the president of the court shall administer to the judge advocate<sup>4</sup> or person officiating as such at courts-martial an oath in the following words:

*I A.B. do swear that I will not, upon any account whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, or a court-martial, in due course of law; [and <sup>5</sup> that I will not, unless it be necessary for the due discharge of my official duties, disclose the sentence of the court until it shall be duly approved.]*

*So help me GOD.*

THE president shall then administer the following oath to every officer who may be in attendance for instruction, in accordance with the Queen's Regulations, viz.:

*I A.B. do swear that I will not, under any circumstances whatever, disclose the vote or opinion of any member of this Court, and that I will not disclose the finding or sentence of the Court, before the same is duly promulgated.*<sup>6</sup>

153. EVERY person, as well civil as military, who may be

<sup>1</sup> In the Mutiny Act prior to 1773, these words were added ["between our Sovereign Lord the King's Majesty and the Prisoner to be tried"].

<sup>2</sup> The Arts. of War in Anne's reign swore the Members against bribery. Bruce (1717), p. 308. As to this oath, Chap. IX. pars. 17 and 22.

<sup>3</sup> Secrecy was imposed by the Arts. of Queen Anne. The oath is not found in 1717, but is in Art. 20 of 1742; and sec. 15, Art. 7 of 1748, it was sanctioned by 22 Geo. II. c. 5, s. 6, but not extended beyond General Courts till the year 1829. <sup>4</sup> By 22 Geo. II. c. 5, s. 7. <sup>5</sup> Added in 1844. <sup>6</sup> Added in 1873.

required to give or produce evidence before a court-martial shall, in the case of a general court-martial, be summoned by the judge advocate general, or his deputy, or the person officiating as judge advocate; — and in the case of all other courts-martial by the president of the court; — and all persons who give evidence before any court-martial, other than those who are by law empowered to make a solemn affirmation, are to be examined upon oath in the following words:

*THE evidence which you shall give before this court shall be the truth, the whole truth, and nothing but the truth.*

*So help you GOD.*<sup>1</sup>

\*154. AFTER any person subject to these articles has been found guilty by court-martial of any offence, the court may, for the purpose of assisting their discretion in awarding punishment for the offence, receive evidence of former convictions against the prisoner, whether convictions by court-martial, or convictions by a court of ordinary criminal jurisdiction.<sup>2</sup>—The court, however, shall not in any case award any other punishment than may be legally awarded for the particular offence of which the prisoner has been found guilty.

155.<sup>3</sup> ANY previous conviction by court-martial may be proved by the entry thereof in the court-martial book or defaulter book, or by certified copy of such entry.

156.<sup>3</sup> ANY previous conviction by a court of ordinary criminal jurisdiction may be proved by the production of the certificate provided for in the 39th section of the Mutiny Act, or by certified copy of such certificate, or by the entry of such conviction in the court-martial book or defaulter book, or by certified copy of such entry.—No entry of a conviction by a court of ordinary criminal jurisdiction shall be made in the court-martial book or defaulter book, except upon such certificate as aforesaid.

157. <sup>4</sup> EVERY judge advocate or person officiating as such at a general court-martial shall transmit, with as much expedition as may be, the original proceedings, and sentence thereof, to the Judge Advocate General in London, in whose office they shall be carefully preserved: — And the president of every district or garrison court-martial shall in like manner transmit the proceedings and sentence thereof: — But the proceedings of district

<sup>1</sup> Chap. IX. par. 50.

<sup>2</sup> Chap. IX. par. 65.

<sup>3</sup> Inserted as 158-9 of 1860, and see 1866.

<sup>4</sup> Ch

garrison courts-martial need not be preserved after the expiration of a period of three<sup>1</sup> years from the date of their deposit in the office of the Judge Advocate General.

158. <sup>2</sup> ANY person tried by a general, district, or garrison court-martial, or any person on his behalf, shall be entitled, on demand made within the space of three years from the date of the final decision on the proceedings, to a copy of such proceedings and sentence (paying<sup>3</sup> for the same at the rate of fourpence per folio of seventy-two words), whether such sentence shall be approved or not as soon after the receipt of the proceedings at the office of the Judge Advocate General as such copy can conveniently be supplied.

159. <sup>4</sup> NO person acting as prosecutor or being a witness for the prosecution shall also act as judge advocate at a trial.

160. <sup>5</sup> TRIALS shall be held between the hours of *eight* in the morning and *four*<sup>6</sup> in the afternoon, except in India, where trials may be held between the hours of *six* in the morning and *four* in the afternoon :—

PROVIDED, that if the court considers it necessary, they may continue any trial beyond the hour of *four* in the afternoon, recording in the proceedings their reason for so doing :—

PROVIDED also, that in cases requiring an immediate example, [<sup>7</sup> or when the general or other officer commanding any body of troops shall certify under his hand that the same is expedient for the public service], trials may be held at any hour.

<sup>8</sup> WHEN it shall appear to the officer convening a court-martial, either before or after the assembling of the court, that it is desirable that the court or some members thereof should have a view of any place in order to their better understanding the evidence that may be given upon the trial, such officer may direct the court, or so many members thereof as he shall think fit, to view such place.

161. NO person shall use menacing words, signs, or gestures in presence of a court-martial ;<sup>9</sup> or shall cause any disorder or riot, so as to disturb the proceedings of the court, [<sup>10</sup> or shall commit any other contempt of the said court], under the penalty, if an officer or

<sup>1</sup> A limitation of twelve years was introduced by the Mutiny Act 1859 (sec. 17) and in Articles of War of 1868, five years was the limitation.

<sup>2</sup> Chap. X. par. 24.

<sup>3</sup> Inserted in sec. 17 of Mutiny Act, 1857.

<sup>4</sup> Inserted in 1863, Chap. IX. par. 13.

<sup>5</sup> Contrast with 1868.

<sup>6</sup> Three prior to 1819.

<sup>7</sup> Inserted in 1872.

<sup>8</sup> Inserted in 1868.

<sup>9</sup> Chap. IX. par. 39.

<sup>10</sup> Inserted in 1869.

soldier, of being punished at the discretion of the said court, or by a court of superior power, and if a civilian, of being taken before a civil magistrate to be punished according to law.<sup>1</sup>

162. ALL the members of a court-martial are to behave with decency; — to take their seats according to rank, and not quit them without permission of the president; <sup>2</sup> — who will clear the court on any discussion; — and in case of intemperate words used by any member of the court, direct the same to be taken down in writing and reported to the officer ordering the court-martial to assemble; — no reproachful words are to be used to witnesses or prisoners; — and the president is hereby held responsible that every person attending such court be treated with proper respect; — and in taking the votes of the court, the president shall begin by that of the youngest member.

163. NO person who shall be acquitted or convicted of any offence shall be liable to be tried a second time by the same or any other court-martial for the same offence; — and no finding, opinion, or sentence given by any court-martial, and signed by the president thereof, shall be revised more than once, nor shall any additional evidence in respect of any charge on which the prisoner then stands arraigned be received by the court on any revision.

#### PROVOST MARSHALS.<sup>3</sup>

164. FOR the prompt and instant repression of all irregularities and crimes abroad which may be committed by troops in the field and on the line of march, provost marshals shall be appointed by us, or by our commander of the forces, or general commanding, and their powers shall be regulated according to the established usages of war <sup>4</sup> and rules of our service, being limited to the punishment of offenders whom they may detect <sup>5</sup> in the actual commission of any crime; — the general commanding our forces in the field will cause them to exercise the powers entrusted to them in such manner and under such circumstances as he may consider best calculated to prevent and instantly to repress crimes injurious to the discipline of our army and the public service; — their duties are to take charge of prisoners confined for offences of a general description;

<sup>1</sup> Sec. 15, Art. 17 of 1748.

<sup>2</sup> Chap. IX., pars. 11 and 60.

<sup>3</sup> This Article was first inserted in the year 1829 (Chap. XI. par. 12), so that Wellington carried on the discipline of the Peninsular Army upon his own authority as General-in-Command, and not with the express sanction of the Code. As to ordinary powers of the Provost, see Letters of 1809, Vol. II. p. 662.

<sup>4</sup> As to the Provost Establishment in the Peninsula, see these references in Desp., vol. iii. p. 488 and 767. Definition of Duties, see vol. v. pp. 347-704; vol. vii. p. 169. <sup>5</sup> Vol. iv. p. 311; and vol. vi. p. 518. A G.O. 3rd Oct. 1810.

— to preserve good order and discipline; — to prevent breaches of both by soldiers and followers of the army, and to punish on the spot,<sup>1</sup> or the same day, those whom they may find in the immediate act of committing breaches of good order and military discipline; — provided that the punishment be limited to the necessity of the case, and shall accord with the orders which the provost may from time to time receive from our commander of the forces in the field, and that whatever may be the crime, the provost marshal [or his assistants<sup>2</sup>] shall see<sup>3</sup> the offender commit the act for which summary punishment may be inflicted, or if the provost marshal or his assistants should not see the offender actually commit the crime, but that sufficient proof can be established of the offender's guilt, a report shall be made to the commander of our army in the field, who is hereby empowered to deal with the case as he may deem most conducive to the maintenance of good order and military discipline.

#### BOARDS AND COURTS OF INQUIRY.

165. FOR the purpose of securing a provision for life to the officers of our army who have sustained serious and permanent injury by wounds received in action with an enemy, according to our rules and regulations for granting pensions to wounded officers, — it is our will and pleasure, that when the state of the officer's wound shall be such as to require him to be inspected by a military medical board, convened by our order through our Secretary of State for War; — such board shall be composed of not more than five nor less than three medical officers, and where three surgeons or medical officers of higher rank are not available, the board may be composed of one surgeon or medical officer of higher rank, and of two assistant surgeons of not less than six years service: — the proceedings of the board in the inspection of wounded officers, and in certain cases of officers retiring on full or half pay, shall be conducted as follows: — The senior medical officer shall act as president, and shall himself make, and require each member to make, the following declaration in presence of the officer whose case is under inquiry:—

*I A.B. do declare, upon my honour, that I will duly and impartially inquire into and give my opinion on the case of the officer now before this*

<sup>1</sup> Vol. iii. p. 405. Stragglers were to be so punished, G.O. 3rd Oct. 1810.

<sup>2</sup> Inserted in 1854, Art. 143.

<sup>3</sup> For inflicting punishment for a crime which the Provost-Marshal did not see committed, the Duke brought the Officer to Court martial. Vol. xiii. Suppl. Desp. 685.

*board, according to the true spirit and meaning of Her Majesty's orders and regulations, and the instructions issued by Her Majesty's orders on this head :— AND I further declare, upon my honour, that I will not, on any account or at any time, disclose or discover my own vote or opinion, or that of any particular member of the board, unless required to do so by competent authority.*

THESE boards<sup>1</sup> will either have for their president, or report their proceedings to, the director general of the army medical department, who will transmit the report, for our decision, to our Commander-in-Chief or Secretary of State for War, as the case may require.

\*166. IN order to secure to the deserving soldier, when discharged, a provision proportioned to the length and nature of his service, and to enable our commissioners of Chelsea Hospital to carry into full effect our rules and regulations for the pensioning of soldiers, — we do hereby order that when a soldier shall be discharged, whether for unfitness, or for any other cause, his services, conduct, character, and the cause of the discharge, shall be ascertained before a regimental board, to be held for the purpose of verifying and recording all these necessary particulars in the discharge, on which document the decision of our commissioners of Chelsea Hospital on the soldier's claim to pension will be made. — The board shall be composed, in all cases, of *three* officers; — the second in command shall be the president, and the two next senior officers on the spot shall be members; — and all military persons who may be summoned by the president thereof, are directed to attend and give information to the board on the subject of their inquiry: — Such board is not competent to award any punishment or forfeiture of service, their duty being restricted to the faithful and impartial record of the soldier's services and conduct at the close of his military career; — and they will be governed in this their duty by a reference to our rules, orders, and regulations for the pensioning of soldiers, which regulations shall be produced before the board whenever it is assembled: — When the board is assembled, the president and members thereof shall severally make the following declaration in the presence of the soldier whose case is under inquiry: —

*I A.B. do declare, upon my honour, that I will duly and impartially inquire into the matters to be brought before this board, according to the*

<sup>1</sup> These Boards originated in 87 and 88 of the Arts. of War, 1830 (Chap. XII. pars. 17 and 18). Each oath varies in its terms. The character of the Court-martial oath is preserved.



*rules and regulations of Her Majesty's service, and if any doubt shall arise, according to my conscience, the best of my understanding, and the custom of the service in like cases.*

167. <sup>1</sup> IF any soldier shall have been illegally absent from his duty for the space of *twenty-one days*,<sup>2</sup> a court of inquiry of *three* officers shall forthwith assemble, [who<sup>3</sup> are hereby empowered to examine witnesses upon oath respecting the fact of such absence], and the deficiency, if any, in the articles of his kit; — and, having received proof on oath of the facts, they shall declare such absence and the period thereof, and the deficiency, if any, in the articles of his kit; and the officer commanding the corps shall enter a record of such absence, and of such deficiency in his kit, and of the declaration of such court of inquiry thereon, in the regimental books; — and if such soldier should not afterwards surrender or be apprehended, such record shall have the legal effect of a conviction for desertion; — <sup>4</sup> [and if such soldier should surrender or be apprehended after such record<sup>5</sup> shall have been so entered, such record, or a copy thereof, purporting to bear the signature of the officer having the custody of the regimental books, shall, on the trial of such soldier be admissible in evidence of the facts therein recorded; — and on proof of the identity of the prisoner with the soldier therein mentioned, he may be found guilty of the charge or charges;] — and if he be convicted of desertion, the sentence of any such court shall be inserted in the soldier's discharge.

FORFEITURE OF PAY, SERVICE, MEDALS, ANNUITIES,  
GRATUITIES, PENSIONS, &c.

168. EVERY soldier found guilty by a court-martial of the following offences:—

Desertion:

Wilfully maiming or injuring<sup>6</sup> himself or any other soldier, whether at the instance of such other soldier or not, — or causing himself to be maimed or injured by any other person, —with intent thereby to render himself, or such other soldier, unfit for service:

<sup>1</sup> Chap. XII. par. 21.

<sup>2</sup> Two months in years prior to 1858.

<sup>3</sup> This power was given in 1858 (Art. 147).      <sup>4</sup> Added in 1857 (Art. 147).

<sup>5</sup> If the Regiment be abroad a copy of this should be sent to the depot. 1872, G. O. 100.

<sup>6</sup> These offences are not so rare as some are desirous of thinking. Within a few months, the case of a Militiaman who had cut off his trigger-finger to get out of the Militia without pay, 18s. 6d., for his discharge came before me. And another where a Soldier was eating soap to induce disease in the lungs or heart to get from the Army.

Tampering with his eyes, with intent thereby to render himself unfit for service :

Such finding having been confirmed ; —

AND every soldier who may have been sentenced to penal servitude,—or who has been discharged with ignominy ; —

AND every soldier who has been found guilty of felony in any court of ordinary criminal jurisdiction in England or Ireland,—or of any crime or offence in any court of criminal judicature in any part of the United Kingdom, or in any dominion, territory, colony, settlement, or island belonging to or occupied by Her Majesty out of the United Kingdom, — which would, if committed in England, amount to felony ; —

SHALL thereupon forfeit all advantage as to good-conduct pay, and pension on discharge, which might have otherwise accrued from the length of his former service ; —

ALSO, all medals and decorations whatsoever which he may be in possession of and authorized to wear, together with the annuity or gratuity, if any, thereto appertaining.

169. ANY soldier who shall have forfeited the whole or any part of his service towards pay and pension, either upon conviction or sentence as aforesaid, or by sentence of a court-martial, or upon his trial for desertion being dispensed with, may, if he shall have subsequently performed good, faithful, or gallant services in our army, on the same being duly certified by our Commander-in-Chief, be eligible to be restored to the benefit of the whole or of any part of his service ; — and should the restoration be approved by us, our order for the same will be signified to our Commander-in-Chief through our Secretary of State for War.

170. NO soldier shall be entitled to pay or to reckon service towards pay or pension when in confinement under a sentence of any court, or during any absence from duty by commitment or confinement as a deserter by confession, or under any charge on which he shall be afterwards convicted, either by court-martial or by any court of ordinary criminal jurisdiction, or whilst in confinement for debt.

171.<sup>1</sup> NO soldier shall be entitled to pay, or to reckon service towards pay or pension, during the period of his absence as a

<sup>1</sup> G. O. 26 July 1810 authorized a stoppage of sixpence a day, but this originated in 1815, men often being taken prisoners by intention or carelessness. See 55 Geo. III. c. 108, s. 125 ; and Art. 65 *ante*.

prisoner of war; — but upon rejoining our service due inquiry shall be made by a court-martial, and unless it shall be proved to the satisfaction of such court that the said soldier was taken prisoner through wilful neglect of duty on his part, or that he had served with, or under, or in some manner aided the enemy, or that he had not returned as soon as possible to our service, he may thereupon be recommended by such court to receive either the whole of such arrears of pay or a proportion thereof, and to reckon service during his absence.

172.<sup>1</sup> ANY soldier who shall be convicted of desertion shall forfeit his pay and service for the day or days during which he was in a state of desertion, and any soldier *who enlisted, re-enlisted, or re-engaged subsequently to the passing of the Army Enlistment Act of 1867, or subsequently to its promulgation in general orders at a foreign station,* shall, if convicted, also forfeit his pay and service for the day or days of his absence exceeding five without leave.

173.<sup>1</sup> ANY soldier who enlisted, re-enlisted, or re-engaged *subsequently to the passing of the Army Enlistment Act of 1867, or subsequently to its promulgation in general orders at a foreign station,* and has been imprisoned by order of his commanding officer, shall forfeit his pay and service for any day or days during which he shall have been so imprisoned; — subject, however, to the right of appeal given in such cases by these articles.

174. ANY soldier shall be liable,—at the discretion of his commanding officer, subject, however, to the right of appeal given in such cases by these articles,—to forfeit his pay for any day or days, not exceeding five, during which he shall have been absent without leave.

175.<sup>2</sup> OUR Secretary of State for War may order or withhold the payment of the whole or of any part of the pay of any officer or soldier which by these articles has been rendered subject to forfeiture by reason of absence from duty for any of the causes aforesaid.

176.<sup>2</sup> OUR Secretary of State for War may also withhold the pay of any officer or soldier for any period during which such officer or soldier shall be absent without leave, or improperly absent from his corps and from his duty.

177.<sup>3</sup> OUR Secretary of State for War may also withhold a portion,

<sup>1</sup> Contrast with same Arts. in 1871.

<sup>2</sup> Inserted as 179, 180, 181, of 1860.

<sup>3</sup> Inserted in 1870, and amended in 1871-3.

not exceeding sixpence of the daily pay of a non-commissioned officer who is not below the rank of a sergeant, and not exceeding threepence of the daily pay of any other soldier, if it shall appear to his satisfaction that such soldier has deserted his wife or any of his legitimate children under fourteen years of age, or left them in destitute circumstances without reasonable cause; — and our Secretary of State may allot the pay thus withheld to the maintenance of such wife or children in such manner as he may think fit.

178.<sup>1</sup> IN case of any doubt whatever as to the proper issue of pay, it may be withheld until our orders respecting it shall have been signified by our Secretary of State for War.

179.<sup>2</sup> IF any soldier being on board ship commits any act of misconduct, his commanding officer may deprive him, for a period not exceeding twenty-eight days, of his ration of wine or spirits or malt liquor, or of his ration of sugar and tea, or any other substitute issuable to him in lieu of such ration of wine or spirits, or malt liquor, — or may sentence such soldier, if he elect to take up neither his ration of wine or spirits or malt liquor, or his ration of sugar and tea, or any substitute issuable to him in lieu thereof, to forfeit one penny a day of his pay for a period not exceeding twenty-eight days.

## SECTION IV.

### RANK.

180.<sup>3</sup> ALL<sup>4</sup> officers doing duty with their regiments only shall take rank according to the dates of their commissions in such regiments; — but when serving together with officers of other corps, each shall take rank according to his brevet or date of any former commission.

181. WHEN our regiments of life guards and horse guards shall do duty together, the eldest officer by commission shall command the whole, regard being always had to the respective ranks of those corps, and the posts they usually occupy: — and if any of our

<sup>1</sup> Inserted as 179, 180, 181 of 1860.

<sup>2</sup> Inserted in 1867.

<sup>3</sup> These Articles were not in 1717, but they (I think) were first inserted in 1784, sec. 15.

<sup>4</sup> The same principle extends to the Royal Marines serving with the army. Art. 153 of M. A. of War.

life guards, horse guards, or foot guards shall be serving with any of our other troops, the eldest officer by commission, without respect to the corps, shall take upon him the command of the whole.

182. WHENEVER our regiments of life guards, or detachments from the same, shall do duty together, unmixed with other corps, they are to be considered as one corps, and the officers are to take rank and do duty according to the dates of their commissions.

183.<sup>1</sup> AND when our regiments of foot guards, or detachments from our said regiments, shall do duty together, unmixed with other corps, they shall be considered as one corps, and the officers shall take rank and do duty according to the commissions by which they are mustered.

184.<sup>2</sup> THE officers in the late East India Company's service and in our Indian army shall take rank with the officers of our forces according to the dates of the commissions held by them respectively from us, or from authorities duly deputed by us.

185.<sup>3</sup> ALL colonels serving by commissions signed by us or by our general commanding in chief in North America, when employed in any duty in conjunction with general officers or colonels serving there by commissions from any of our civil authorities in the country, shall have precedence of such provincial officers, although their commissions be of elder date; — and in like manner all officers, below the degree of colonel, having commissions signed by us, shall have precedence of such provincial officers of equal rank, though their commissions be of elder date.

186. OFFICERS of our regular forces, and also officers of our militia and fencible forces who take rank with officers of our regular forces as the youngest of their degree, shall have precedence of and command the officers of equal degree serving in our yeomanry, cavalry and volunteer corps; — and the officers of our yeomanry, cavalry and volunteer corps shall rank together according to the dates of their respective commissions, except in cases where we may otherwise specially direct.<sup>4</sup>

<sup>1</sup> These Articles were not in 1717, but they (I think) were first inserted in 1784, sec. 15.

<sup>2</sup> This was added in 1785 as two Arts. to sec. 23.

<sup>3</sup> Inserted in 1755, sec. 19, Art. 2, during the war in America.

<sup>4</sup> Inserted in 1798, and revised in 1867.

RELATIVE RANK. 210 H. D. (3) 120.

1. *Army*.—The rank, or rule of precedence in the "Army," is governed by this Section of the Articles of War.

2. *Militia*.—The Relative Rank of the "Militia" towards the "Army," was

## SECTION V.

## APPLICATION OF THE ARTICLES.

187. ALL the provisions of these Articles shall apply to every person who is or shall be commissioned or in pay as an officer, or who is or shall be attested or in pay as a non-commissioned officer or soldier, [and to <sup>1</sup> all warrant officers], and to all persons employed on the recruiting service, receiving pay in respect of such service; — and to persons who are or shall be hired to be employed in our royal artillery, royal engineers, and to master gunners, and to conductors of stores, and to the corps of royal military surveyors and draughtsmen, and to all officers and persons who are or shall be serving [in the <sup>2</sup> Control Department,] and to officers and soldiers serving in the army hospital corps, or in the army service corps and to persons in the War Department, who are or shall be serving with any part of our forces, at home or abroad, under the command of any commissioned officer; — and (subject to and in accordance with the provisions of statute of sixth and seventh Victoria, chapter ninety-five,) to any out-pensioners of the Royal Hospital, Chelsea, who may be called out on duty in aid of the civil power, or for muster of inspection, or who, having volunteered their services for that purpose, shall be kept on duty in any fort, town, or garrison; — and to all civil officers who are or shall be employed by or act under our Secretary of State for War at any of our establishments in our islands of Jersey, Guernsey, Alderney, Sark, and Man, and the islands thereto belonging, or at foreign stations; — and to all persons belonging to Her Majesty's Indian forces who are or shall

fixed by the Militia Act of 1756, and continued in 1802 as "equal in degree," but junior in service; so that under the Militia Statute,\* a Lieutenant-Colonel or a Field Officer of the Militia would command all the Majors or the Captains (as the case may be) of the Regular Army.

3. *Yeomanry*.—The Relative Rank of the Yeomanry is governed by 44 Geo. III. c. 54,† which placed these Officers as junior to the Officers of the Army and Militia, but with a restriction that no Yeomanry Officer shall ever rank above a Field Officer of either Service. A Yeomanry Major would, however, command all Captains of the other Forces.

4. *Volunteers*.—The Relative Rank of the Volunteer Officer, is as the youngest of their respective ranks; but he is prohibited from ever exercising‡ command over any other Forces other than as the Articles of War prescribe.

<sup>1</sup> Added in 1865.

<sup>2</sup> Inserted in 1872.

\* 42 Geo. III. c. 90, s. 2, and see 1s Vict. c. 1, sec. 7, though the Act has expired  
† Sec. 26.

‡ Sec. 5 of 26 & 27 Vic. c. 65.

be commissioned or in pay as officers, or who shall be listed or in pay as non-commissioned officers or soldiers, or who are or shall be serving or hired to be employed in the artillery or any of the trains of artillery, or as master gunners or gunners, or as conductors of stores, or who are or shall be serving in the department of engineers, or in the corps of sappers and miners or pioneers, or as military surveyors or draughtsmen, or in the ordnance or public works or commissariat departments; — and to all storekeepers, and other civil officers employed under the ordnance: — and to all veterinary surgeons, medical storekeepers, apothecaries, hospital stewards, and others serving in the medical department of the said forces; — and to all licensed sutlers, and all followers in or of any of the said forces.

188. IN construing these articles, the word “regiment” may be deemed to include other branches of the service than those which are strictly regimental, and the provisions relating to regiments may be applied to such other branches; <sup>1</sup> — the words “Commander-in-Chief” shall be taken to include the field marshal or other officer commanding in chief our forces for the time being; <sup>2</sup> the word “month” shall be taken to mean “lunar month,” and the word “year” to mean “calendar year;” the word “district” shall in India be deemed to include a division, field force, or district directly subject to the command of the general commanding in chief the troops of the presidency; “one penny” shall in India be construed to mean “eight pies.” <sup>3</sup>

189. NO person subject to the Mutiny Act shall be sentenced to suffer any punishment extending to life or limb, or to be kept in penal servitude, by virtue of these our Articles of War, except for such crimes as are expressly declared by the Mutiny Act to be so punishable.

190.<sup>4</sup> THE officers and soldiers of any troops, being mustered and in pay abroad, which are or shall be raised or serving in any of our dominions abroad, or in countries or places in possession of or occupied by our subjects or any of our forces; — shall at all times, and in all places, when joined or acting in conjunction with our forces; — or under the command of any officer having a commission immediately from us; — be subject to these our Articles of War, and shall be liable to be tried by courts-martial, in like manner as our forces are.

<sup>1</sup> Inserted so far in 1860. <sup>2</sup> Inserted in 1869. <sup>3</sup> Inserted in 1862 and 1863.

<sup>4</sup> See Art. 185 *ante*, 26 & 27 Vic. c. 65, s. 5.

191.<sup>1</sup> WHENEVER any of our forces shall be embarked on board our ships of war or any other ships which may have been regularly commissioned by us, and which may be employed in the transport of our troops;—our will and pleasure is, that the officers and

<sup>1</sup> This was put forth in 1795, as explained in Chap. V. pars. 45, 46.

*Extract from Letter from H.R.H. The Duke of York to General Sir Ralph Abercrombie, dated 24th March, and included in the Admiralty Order of the 28th March 1795.*

"It appearing at the same time to be highly expedient that the Troops should know how to conduct themselves in circumstances affecting their situation and discipline while on board such ships, I have it in command from His Majesty to give you the following instructions which you will impart to the Senior Officer of each Detachment of the Forces under your command, embarked on board ships of the description mentioned in the Article of War:—

"1st. In case any Officer, non-Commissioned Officer, or Soldier shall be guilty of any offence against the Laws and Regulations established for the Government and Discipline of the Ship in which he is embarked, the Commanding Officer of such Ship, by his own authority, and without reference to any other person, is to cause him to be put under arrest, or confine him a close prisoner if the circumstances of the case and the Naval Articles require it; and to detain him (if necessary) in either of these situations during his continuance on board, transmitting, without delay, a report in writing of the charges against such Officer, or Soldier, to his superior Officer, or to the Commander-in-Chief of the Land Forces, in order that he may be disembarked, or removed into some Transport the first convenient opportunity, and then proceeded against according to Military Law; if the offence charged be such as is cognizable by a General or Regimental Court-martial.

"2nd. In cases where the practice of the Navy authorizes immediate punishment, Private Soldiers (but no others) are to suffer such punishment as the Commanding Officer of the Ship may think fit to be inflicted, provided the Commanding Officer of the Troops shall previously concur in the necessity of such an immediate punishment. But if the latter differs in opinion thereupon (the reasons for which difference of opinion he shall state in writing, and deliver to the Commanding Officer of the Ship), the delinquents are to be disembarked or removed into a Transport, and to be proceeded against as stated in the preceding Article.

"3rd. The Military Courts-martial, whether General or Regimental, cannot be held on board the said Ships consistently with the Laws of the Navy.

"4th. Should any Officer or Soldier, while embarked in such Ships, commit any Military offence for which he would be amenable to a Court-martial if serving on shore, requisition is to be made by his Commanding Officer to the Commanding Officer of the Ship, who will thereupon cause such Officer or Soldier to be put under arrest, or confinement, until he can be removed in the manner above mentioned, and brought to Trial.

"I am, &c.,

(Signed) "FREDERICK."\*

\* As to the controversy arising on this Order (for a copy of which I am indebted to Mr. Syms of the Adjutant-General's Office), see the Protest of the Admirals against it printed in vol. 1. *McAr.*, C. M., p. 408.



soldiers of such forces, from the time of embarkation on board any ship as above described, shall strictly conform themselves to the laws and regulations established for the government and discipline of the said ship, and shall consider themselves, for these necessary purposes, under the command of the senior officer of the particular ship, as well as of the superior officer of the fleet (if any) to which such ship belongs.

192. THE second section of these our Articles of war is to be read and published *once* in every *three months*<sup>1</sup> at the head of every corps in our service, together with the following articles in the other sections which are marked with an asterisk; viz.

4.	21.	118.	129.	135.	140.
5.	22.	119.	130.	136.	154.
8.	23.	126.	131.	137.	166.
13.	29.	127.	132.		

ALSO the following Notice :—

Under the existing law,<sup>2</sup> any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in Her Majesty's forces by sea or land from his or their duty and allegiance to Her Majesty,—or to incite or stir up any such person or persons to commit any act of mutiny,—or to make or endeavour to make any mutinous assembly,—or to commit any traitorous or mutinous practice whatsoever, may on being legally convicted of such offence be sentenced to penal servitude for the term of the natural life of such person.

V. R.

<sup>1</sup> This appears to have been the practice when Turner wrote, p. 208.

<sup>2</sup> Is the 37 Geo. III. c. 70, and this notice was first added in the Articles of War, 1831.

## APPENDIX D.—CHAP. II. PAR. 57.

*Extracts from Section 6, "Discipline," &c., and sec. 8, "Duties," from the Queen's Regulations of September 1873 are given as introductory to "Court-martial procedure," referred to in the Appendix F.*

## CONTENTS.

## SEC. 6.—COURTS-MARTIAL.

ART.		PAGE
47.	Duties devolving on members .. .. .	311
48.	Officers on joining to attend trials .. .. .	312
49.	Investigation of charges .. .. .	312
50.	District Court-martial sufficient in ordinary cases .. .. .	312
51.	Crime of theft .. .. .	312
52.	On foreign stations .. .. .	312
53.	Officers in arrest .. .. .	313
54.	Presidents .. .. .	313
55.	Courts-martial on officers .. .. .	313
56.	On commanding officers .. .. .	313
57.	Books, &c. .. .. .	313
58.	Copy of charge to be given to prisoner .. .. .	313
59.	Charges of drunkenness .. .. .	314
60.	Military witnesses from distant stations .. .. .	314
61.	Medical certificate .. .. .	314
62.	Sentences remitted or proceedings quashed .. .. .	315
63.	Militiamen fraudulently enlisting into the army .. .. .	315
64.	Restoration of forfeited service .. .. .	315
65.	Mode of reckoning .. .. .	316
66.	Applications how to be made .. .. .	316
67.	Power of commanding officers to assemble .. .. .	316
68.	Functions .. .. .	317
69.	Composition .. .. .	317
70.	Medical officers not to be detailed .. .. .	317
71.	Forms .. .. .	317

II. COURTS-MARTIAL.<sup>1</sup>

47. The duties devolving upon members of courts-martial are of the most grave and important nature, and in order to discharge

<sup>1</sup> My attention has been called by Lieut.-Colonel Vacher (of the Adjutant-General's Department) to these Regulations, issued since the first edition of this work appeared.

them with justice and propriety it is incumbent upon all officers to apply themselves diligently to the acquirement of a competent knowledge of Military Law, as laid down in the Mutiny Act and Articles of War, and of the orders and regulations founded thereon (see Appendix), as also of the practice of Military Courts, with the view of making themselves acquainted with the nature and extent of the powers vested in them by the Legislature. It is by the temperate and judicious exercise of these powers that the discipline and character of the Army will be maintained.

48. With this object in view, officers will be required on their entrance into the army to attend the proceedings of all courts-martial that may be held at the station where they are quartered for at least six months from the date of their joining. They are to remain in court throughout the proceedings, but are not to be nominated members of courts-martial until the commanding officer shall deem them perfectly competent to perform so important a duty. [See also 152 Art. of War.]

49. All charges preferred against an officer or soldier, and the circumstances on which they are founded, are to be examined by superior authority, and the evidence should be sufficiently conclusive to justify the arraignment of the accused before a Court-martial.<sup>1</sup> The officer investigating the charges should be careful to avoid any expression of opinion as to the guilt or innocence of the prisoner.

50. There are few crimes committed by soldiers which cannot effectually be dealt with by district courts-martial, the powers given to which are ample for the maintenance of discipline among the non-commissioned officers and privates. The higher tribunal of a general court-martial is not to be resorted to, except in aggravated cases, for which the more severe punishment of penal servitude or death can be awarded.

51. The crime of theft from a comrade should as a general rule, unless there are peculiarly complicated circumstances in connexion with the case, be dealt with by Court-martial in preference to being tried by the civil power.

52. General and other officers commanding on foreign stations are restricted from sending home officers or men, with articles of accusation pending against them, except in cases of the most urgent and unavoidable necessity, as it is essential for the due administration of justice that when charges are preferred they should be thoroughly investigated on the spot, and without unnecessary

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<sup>1</sup> The prescribed form of application for Courts-martial on soldiers is W. O. Form, 733.

delay. A commanding officer who, under any circumstances, not unavoidable, delays to bring forward charges, or permits charges to lie dormant, fails in a most essential duty to the service.

53. An officer who may be placed in arrest has no right to demand a court-martial upon himself, or to persist in considering himself under the restraint of such arrest, or to refuse to return to the exercise of his duty, after he shall have been released by proper authority. It by no means follows that an officer conceiving himself to have been wrongfully put in arrest, or otherwise aggrieved, is without remedy; a complaint is afterwards open to him, if preferred in a proper manner, and provision for that purpose is made in the Articles of War. An officer in close arrest is not allowed to leave his quarters or tent. If he be in arrest at large, he may be permitted by superior authority to take exercise within defined limits, viz., not beyond the barracks, or if in camp, not beyond the quarter guard, and then only at stated periods; but he is not to appear in his own or in any other mess premises, nor at any place of amusement or public resort, and he is on no pretext to quit his room, or tent, dressed otherwise than in uniform, but without his sash and sword. When placed in arrest, he should be deprived of his sword until released. When an officer is placed in arrest by his commanding officer, the circumstances of the case should immediately be brought to the notice of the general officer commanding.

54. Whenever general officers, or colonels, are available as presidents of general courts-martial no officer of inferior rank is to be placed on that duty.

55. Whenever it can be arranged without serious inconvenience to the service, the members of a court-martial assembled for the trial of an officer are to be of equal, if not superior, rank to the prisoner; and in no case but one of necessity is a colonel to sit upon the trial of a general officer, or a captain on that of a field officer, or a subaltern officer on that of a captain. On the trial of subaltern officers, two officers of that rank are considered a sufficient proportion to be detailed as members of the court. The members of a court may however be of any rank superior to that of the prisoner.

56. When the commanding officer of a corps is brought to trial, care is to be taken that as many members of the court as possible shall be officers who have themselves held, or who are holding commands equivalent to that held by the prisoner.

57. All official books and orders having reference to courts-martial are to be laid before every court when sitting.

58. Upon any trial by court-martial being ordered, the commanding officer of the corps to which the accused belongs or is attached, will be held responsible that the accused be furnished

by the Adjutant or by a commissioned officer, with a copy of the charge or charges preferred against him, at least twenty-four hours before the court is to assemble, unless the exigencies of the service render this impossible. To a soldier who cannot read the charge is to be read, and, if necessary, explained by the person who warns him for trial, and a list of all witnesses for the prosecution is at the same time to be given to the prisoner.

59. The attention of general and commanding officers is particularly called to the 78th Article of War, which prohibits the trial of private soldiers by regimental court-martial, for drunkenness not on duty, but provides for their being brought to trial by a district or garrison court-martial under certain conditions therein prescribed. If, however, a soldier commits that offence, in combination with some other crime for which it is intended to bring him to trial before a regimental court-martial, the act of drunkenness is not to be added to the charge on which he is to be arraigned; but, as it is necessary that the drunkenness should be recorded, in order to compute the fines which may have to be subsequently levied, commanding officers should award punishment for that offence before the prisoner is brought to trial on the other charge.

60. When a soldier is required as a witness before a court-martial, and is not serving in the district in which the court is to be held, application is to be made by the commanding officer to the Adjutant General for the attendance of such soldier, naming the probable day of the assembly of the court.

61. A certificate, showing the state of health of the prisoner on the day of trial, is to be laid before the court and attached to the proceedings. The certificate is to be in the handwriting of a medical officer, according to the following form:—

*“ I certify that No.                      , A.B. of the                      Regiment is [or is  
 “ not] in a good state of health, and fit [or unfit] to undergo [the words  
 “ corporal punishment” to be here inserted in the case of a soldier  
 “ tried whilst on active service in the field] imprisonment, solitary or  
 “ otherwise, and with or without hard labour; and that his present  
 “ appearance and previous medical history both justify the belief that  
 “ hard labour employment will neither be likely to originate nor to re-  
 “ produce disease of any description.” [If the Prisoner is to be  
 tried for desertion, the certificate is also to state whether the  
 soldier is physically fit [or unfit] for the service.]*

The certificate is to be renewed in the event of any change taking place in the state of health of the prisoner during the sitting of the court.

62. When a soldier has been tried and sentenced by court-martial, and his punishment has been wholly remitted, there is to be no remission of any penalty consequent on his conviction, such as forfeiture of service, good-conduct pay, &c. &c.; but when the proceedings of a court are *quashed* on account of their illegality, or from any other circumstances, the soldier is to be relieved from all consequences of his trial, and all record of it is to be erased.

63. When militia regiments report the fraudulent enlistment of a militia-man into the army, they are required to furnish the corps in which the man is serving with a duplicate of his militia attestation, and a certificate as follows:—

“I hereby certify that regimental No. \_\_\_\_\_ has not been  
 “released from his engagement to serve in the \_\_\_\_\_ and that the  
 “officer commanding the regiment has no objection to his being retained  
 “to serve in Her Majesty’s Army.

“Signed \_\_\_\_\_

Adjutant.

Militia.”

Commanding officers will, on the receipt of these documents take the necessary steps for dealing with such men, in accordance with the provisions of the 50th section of the Mutiny Act, without reference to the Adjutant General. Reports of the result are in each case to be made *direct* to the militia regiments. Care is to be taken, in every case, that the certificate of the consent of the militia commanding officer to the man’s retention to serve in the army is attached to his army attestation.

64. A soldier who has forfeited his service towards good-conduct pay and pension, will be eligible to be recommended for the restoration of such service when he establishes his claim thereto by uninterrupted good conduct (as shown by his having no entries in the Regimental Defaulter Book) for five years in case of a first conviction entailing loss of service, for seven years in case of a second conviction of the same nature, and for ten years should any circumstance of an aggravated character have attended the commission of the offence on account of which he had incurred the penalties in question. Fraudulent enlistment while belonging to the Militia will be considered as a conviction, for this purpose only, although the man may not have been tried for the offence. A soldier may, however, be recommended for such restoration within half the periods here prescribed, provided he has shown not only unremitting good conduct, but has also given good, faithful, or gallant service of a constant and sustained character in

the field, or has performed some specific act of valour in the field, reflecting honour on the regiment, and on himself.

65. The period of probation will be reckoned from the release of the soldier from imprisonment, and his return to duty, or in the case of a man confessing desertion whose trial has been dispensed with from the date of his last attestation. In cases of fraudulent enlistment from the militia, the period of probation will reckon from the date of his last attestation for the line.

66. Commanding officers will make their applications to the Adjutant General on the 1st January and 1st July of each year, for all men under their command who during each previous half year may have become eligible for restoration of forfeited service, under the rule above stated, noting opposite each man's name the exact date of his so becoming eligible. These applications are to be made on W. O. Form 435 (or 495, as the case may be), and are to be accompanied in each case by a certified copy of the record of the soldier's service. The case of a soldier awaiting discharge may be specially submitted directly he becomes eligible, when it is considered desirable not to postpone the applications until the half-yearly period. A covering-letter need not be forwarded with these applications except in the special cases, and blank returns are not to be rendered when there are no men eligible.<sup>1</sup>

### III.—COURTS OF INQUIRY AND BOARDS.<sup>2</sup>

67. A Court of Inquiry may be assembled by any officer in command, to assist him in arriving at a correct conclusion on any subject on which it may be expedient for him to be thoroughly informed. With this object in view, such Court may be directed to investigate and report upon any matters that may be brought before it; but it has no power (except when convened to record the illegal absence of soldiers, as provided for in the Articles of War) to administer an oath, nor to compel the attendance of witnesses not military.<sup>3</sup>

<sup>1</sup> *Note to pars. 64–66.* Applications for soldiers to be allowed to reckon former service under the provisions of clause 62, Army Circulars 1873 (R. Warrant of 3rd May), will be made to the Adjutant General on W. O. Form 1133, accompanied by the documents prescribed therein. The date of last entry in regimental defaulter book to be given in each case.

<sup>2</sup> *Dawkins v. Rokeby*, 8 L. R. (Q. B.) p. 266.

<sup>3</sup> 1869. Q. R. 1873, sec. 23, 41, and 43.

The attention of general and commanding officers is called to the 167th Article of War, which empowers Courts of Inquiry, assembled to record the absence without leave of soldiers, to take evidence upon oath respecting the deficiency of any articles of the absentee's kit, as well as to the fact of the man's absence. The declaration of such courts is to be entered in the Regimental Court-martial Book, and that record, or a copy thereof, purporting to bear the signature

68. A Court of Inquiry is not to be considered in any light as a judicial body. It may be employed, at the discretion of the convening officer, to collect and record information only; or it may be required to give an opinion also on any proposed question, or as to the origin or cause of certain existing facts or circumstances. Specific instructions on these points are however always to be given to the Court. The proceedings are to be recorded in writing, as far as practicable in the form prescribed for courts-martial, signed by each member, and forwarded to the convening authority by the president. The foregoing applies equally to a board of officers assembled by a commanding officer.

69. A Court of Inquiry or Board of Officers may consist of any number of members, but the composition of such Courts or boards must be regulated, at the discretion of the convening officer, by the circumstances under which they are assembled. Three members, the senior acting as president, will in ordinary cases be found sufficient.

70. Medical Officers are exempted from serving as members of Courts of Inquiry or Boards, except medical Boards. Should a medical opinion be required by a military board, reference is to be made to the medical officer detailed to attend it, who will furnish his report in writing, or give evidence in person if considered necessary.

71. All proceedings of Courts of Inquiry, Boards, or Committees, for which special printed forms are not provided, are to be written on W. O. Form 263, which has been introduced for general use.

#### SEC. 8.—I. ROSTER OF DUTIES.

ART.	PAGE
1. To commence from senior .. .. .	317
2. Classification of duties .. .. .	317
3. Duties, how detailed .. .. .	318
4. Courts-martial .. .. .	318

#### SEC. 8.—I. ROSTER OF DUTIES.

1. In all duties, whether with or without arms and whether performed by corps or by individual officers, the roster is to commence from the senior downwards.

of the officer having the custody of the regimental books, shall be a evidence of the facts on the trial of the soldier. The original process be destroyed.\*

When a regiment embarks for foreign service, copies of such records as all men still absent, verified by the officer having custody of the are to be left with the depot.

\* Q. R. 1473, sec. 23, par. 43.



## 2. Duties are thus classified:—

- I. Guards, 1st, of the Sovereign; 2nd, of Members of the Royal Family; 3rd, of Viceroy; 4th, of the Captain-General, or Governor of a Colony; 5th, of the Commander-in-chief at home or abroad.
- II. Divisional duties under arms.
- III. Brigade or garrison duties under arms. } Including orderly and piquet duty.
- IV. Regimental duties under arms.
- V. Courts-martial. 1st, general; 2nd, district or garrison; 3rd, regimental.
- VI. Boards or courts of inquiry. 1st, divisional; 2nd, brigade; 3rd, regimental.

3. When an officer's tour for more than one duty comes round on the same date, he is to be detailed for that duty only, which has the precedence in the classification in par. 2, and he is to receive an overslaugh for any other duties. When an officer is actually in the performance of one duty, and his tour for another duty occurs, he is not to make good that other duty, but his tour is to pass him. An officer detailed as "in waiting" is not entitled to count a tour of duty.

4. Attendance at a court-martial, the members of which shall have been assembled and sworn, is to be reckoned a duty, though the court shall be dissolved without trying any person. On any day on which a court-martial is not actually sitting, its members are, without further orders, to be considered available for parades or other duties; they are not however to quit the station without the authority of the General Officer commanding, until the court shall have been dissolved. This rule is also applicable to courts of inquiry and boards.

## APPENDIX E.—CHAP. II. PAR. 37.

*From Appendix (a) to the Queen's Regulations of September 1873.  
"Court-martial Procedure."*

### (a).—GENERAL INSTRUCTIONS.

ART.		PAGE
1.	Separate trial for each prisoner .. .. .	319
2.	Adjournments .. .. .	319
3.	Instructions in framing charges .. .. .	319
4.	Charges of "Disgraceful conduct" .. .. .	320
5.	Plea of prisoner .. .. .	320
6.	Witnesses refusing to be sworn .. .. .	320

ART.	PAGE
7. Mode of giving evidence .. .. .	320
8. Former convictions, age, &c. .. .. .	320
9. Minutes of proceedings .. .. .	320
10. Powers and duties of Deputy Judge Advocates at home .. .. .	321
11. Addresses of prosecutor and reply of prisoner .. .. .	321
12. Sentences modified .. .. .	322
13. Wordling of sentences .. .. .	322
14. Sentences of mixed imprisonment .. .. .	322
15. Offenders already under sentence .. .. .	322
16. Order for revision .. .. .	323
17. Discrimination in awarding punishment .. .. .	323
18. Non-commissioned officers .. .. .	323
19. Acting N. C. O.'s .. .. .	323
20. Reprimanding N. C. O.'s .. .. .	323
21. Duration of imprisonment .. .. .	323
22. General Courts-martial .. .. .	323
23. District or garrison Courts-martial .. .. .	323
24. After promulgation .. .. .	324
25. Covering letters .. .. .	324
Note as to civil offences cognizable by the civil power .. .. .	324

(a) General Instructions.

1. Any number of prisoners may be tried together for an offence committed collectively, but the plea, defence, finding and sentence must be recorded separately. When more prisoners than one are tried separately by the same court-martial, the court is in all cases to be re-sworn at the commencement of each trial, and the proceedings of each trial are to be conducted and recorded separately.

2. It is important that every trial by court-martial once begun should, as far as possible, proceed with strict regularity, and without interruption, to its conclusion. The court have the power of granting an adjournment, but they should in no case permit an adjournment for the purpose of obtaining further evidence, either on behalf of the prosecution or of the prisoner, unless they are satisfied that such adjournment and production of the evidence desired is not unjust to the prisoner, and that it is necessary to assist the course of justice. Great care is therefore to be taken, both by the prosecuting officer and the prisoner, to have ready at the trial all the witnesses and documents which they may desire to produce in support of their respective cases.

3. In framing charges, care is to be taken to render them specific, in names, dates, and places. In charges against non-commissioned officers or soldiers, the prisoner's regimental number is to be inserted, but all non-essential minutiae are to be avoided. Where a prisoner is charged with any loss or damage of articles of kit, necessaries, arms, clothing, &c., the prices of which are fixed by regulation, the value

of such loss or damage shall not appear in the charge. In all other cases, the value shall appear in the charge, and be proved in evidence. In the case of loss of, or damage to, great-coats or articles of which the regulation value depends upon the length of time in wear, the time such article has been in wear shall be proved by evidence.

4. A charge of "disgraceful conduct" is never to be preferred against a soldier unless the offence is clearly one of those specified in the Articles of War as constituting disgraceful conduct, or is obviously of a felonious or fraudulent nature, or of a cruel, indecent, or unnatural kind.

5. A prisoner may plead either "guilty" or "not guilty" to the charge. Should he refuse to answer, a plea of "not guilty" is to be recorded on his behalf. Before recording a plea of "guilty," the court will satisfy themselves that the prisoner fully understands all the advantages he forfeits by that plea. Whatever the plea may be, however, it is incumbent on the court to investigate the charge, so that all the circumstances connected therewith may be known to the confirming authority.

6. Military (or civil) witnesses refusing to be sworn cannot be brought to trial if such refusal is grounded on conscientious motives. The Act 24 & 25 Vic. c. 66 enacts in such a case that the president is qualified to receive the witness's solemn affirmation, which may be given in the following form:—

*"I, A. B., do solemnly, sincerely, and truly affirm and declare that the taking of any oath is, according to my religious belief, unlawful: and I do also solemnly, sincerely, and truly affirm and declare that I will speak the truth in the matter now under investigation."*

7. When a witness gives evidence before a court-martial, he should answer the question as one put to him by the prisoner or the prosecutor, but he will address his reply to the court.

8. After a soldier has been found guilty of the charge or charges preferred against him, the court is to inquire into and record the prisoner's former convictions (if any), and any sentence which he may be undergoing; also his age, date of attestation, service allowed to reckon towards limited engagement, his general character, and any medals, good conduct badges, or other honorary rewards of which he may be in possession. These particulars are required for the guidance of the court in awarding punishment, as well as for that of the confirming authority in sanctioning the award. The evidence under this head is to be given when possible by a commissioned officer who is not a member of the court.

9. The minutes of the proceedings of all courts-martial are to

be fairly and accurately recorded, in a clear and legible hand, without erasures. (See Appendix B.) When interlineations, or corrections, which should be avoided as much as possible, are necessarily made, they are to be verified by the president's initials. The pages are to be numbered, and the sheets fastened together. Care is to be taken that sufficient space, at least half a page, is left, immediately below the signature of the president, for the signature and remarks of the confirming authority. The station and date to be added in all cases.

10. The powers and duties of a DEPUTY JUDGE ADVOCATE are defined as follows :—

- a. At a general court-martial he represents the Judge Advocate General.
- b. Whether consulted or not, he will give his advice on any matter before the court. He is *responsible* for the due formality and legality of the proceedings.
- c. At the conclusion of the case, he will sum up the evidence and give his opinion upon the legal bearing of the case, before the court proceeds to deliberate upon its finding.
- d. The opinion of the deputy judge advocate must be considered conclusive upon any point of law or procedure which arises upon a trial at which he officially attends.
- e. He will be responsible to the Judge Advocate General for a proper record of the proceedings. In important cases he should be assisted in the discharge of this duty by a sworn short-hand writer.
- f. In all cases where a prisoner is undefended, the deputy judge advocate is to take care that the prisoner does not lose any privilege that the law allows him in the conduct of the trial.
- g. While taking care that all legal details are strictly observed, he will maintain an entirely impartial position.

11. The following instructions are also to be observed in respect to addresses to the Court from the officer conducting the prosecution and from the prisoner :—

- a. The officer conducting the prosecution is to be allowed an opening address. At the close of the evidence for the prosecution, the deputy judge advocate will ask the prisoner if he intends to adduce evidence. If the prisoner then replies in the negative, the prosecutor may proceed to address the Court a second time, for the purpose of summing up the evidence for the prosecution, after which the prisoner may address the Court in his defence. At the conclusion of the

prisoner's address, the deputy judge advocate will, in open court, sum up the whole case to the Court.

- b. If, in answer to the deputy judge advocate, the prisoner states that he intends to adduce evidence, he may open his case with an address, before calling his witnesses. At the conclusion of the evidence he may again address the Court, after which the prosecutor will be entitled to a reply.
- c. In those special cases where evidence is allowed in reply, the second address of the prisoner is to be made after such evidence, and immediately before the prosecutor's reply, which is to be followed by the address of the deputy judge advocate.
- d. After the deputy judge advocate has spoken, no other address is to be allowed, and the Court will retire to consider their finding.
- e. If any question should arise incidentally during the trial, such as upon the admissibility of evidence, the person, whether prosecutor or prisoner, requesting the opinion of the Court, is to speak first: the other person is then to answer, and the first person is to be allowed to reply.

12. Courts-martial, before passing sentence, are to ascertain that the state of health of the prisoner, as shown by the medical certificate, will admit of the sentence being forthwith carried into effect. If the certificate states that the prisoner is unable to undergo hard labour, the court may nevertheless award "*imprisonment with such labour as in the opinion of the medical officer of the prison the prisoner may be equal to.*"

13. The sentence should conform to the wording of any section of the Mutiny Act, or of any Article of War, that may be applicable, without quoting it. Sentences of imprisonment are always to be specified in days.

14. In passing sentences of mixed imprisonment, courts-martial should leave it to the discretion of the governor of the prison to appoint the precise period or periods of the imprisonment during which the offender shall undergo solitary confinement. They will, however, in wording their sentence carefully comply with the directions contained in the Articles of War respecting the length of the periods of solitary confinement, and the intervals between such periods. (See Appendix B, Sentences.)

15. When courts-martial avail themselves of the power vested in them by the Mutiny Act regarding the imprisonment of offenders already under sentence for previous offences, they should be careful to adhere to the provisions of the said Act, by awarding in expres

terms that "*the imprisonment is to commence at the expiration of the punishment to which the prisoner had been previously sentenced.*"

16. Whenever a court-martial is re-assembled for the purpose of revising their proceedings, the letter, order, or memorandum, or a copy thereof, containing the instructions to the court, and the reasons for requiring the revision, is to be attached to, and form part of, the proceedings.

17. Just discrimination is to be used by the court in applying the quantum of punishment to the nature and degree of the offence, so that the award may be final, and carried into effect; as it is indisputable that crimes are more effectually prevented by the certainty than by the severity of punishment.

18. When a non-commissioned officer is sentenced to be reduced, it must be distinctly stated in the sentence that he is to be "reduced to the ranks" (i.e., to a gunner, driver, sapper, or private). The sentence of reduction of artificers, having the rank of a non-commissioned officer, is to be awarded in the same terms, i.e., "to the ranks," and not to shoeing smiths, &c.

19. Whenever an acting bombardier or lance corporal is brought to trial by court-martial, he is to be arraigned as a gunner, driver, sapper, or private, as the case may be, with the acting rank also designated thus; No. —, Gunner (Acting bombardier), A.B., No. —, Private (Lance corporal), C.D., and so on. The loss of acting or lance rank shall not form part of the sentence of the court.

20. It is forbidden to reprimand a non-commissioned officer by sentence of court-martial, such a sentence being applicable only to commissioned officers.

21. The duration of imprisonment for all ordinary offences should not exceed six months; for offences of a more aggravated character, imprisonment may, under the provisions of the Articles of War, be awarded by court-martial to the extent of, but not exceeding, two years. In awarding sentences of imprisonment, the locality and climate in which the offender has to suffer must, however, be kept in view. It is also the province of the general officer confirming the sentence to take these circumstances into consideration, with a view to diminish, if necessary, the period of imprisonment.

22. If the trial takes place at home the proceedings of a court-martial are to be transmitted by the commanding officer to the Judge Advocate General, for his signature; if abroad, to the General in command, for his signature, and authority to confirm the sentence.

23. The proceedings of a court-martial are to be forwarded by the commanding officer to the Judge Advocate General, for his signature; if abroad, to the General in command, for his signature, and authority to confirm the sentence.

to the General officer commanding (or to Army Head Quarters, where there is no general officer in command) for confirmation.

24. When the proceedings of district courts-martial abroad have been confirmed and promulgated, they are to be forwarded by the president to the Judge Advocate General. On home service the proceedings are to be sent by the president under cover to the deputy judge advocate of the district, who will submit them to the Judge Advocate General, at the same time drawing his immediate attention to anything requiring notice in the proceedings.

25. All proceedings of courts-martial transmitted to the Judge Advocate General, whether before or after promulgation, are to be accompanied by a covering letter specifying the nature of the contents.

#### NOTE TO APPENDIX E.

The following Instructions, which were issued by the Secretary of State for War on the 26th January, 1863, for the guidance of Commanding Officers and others, are republished for general information :—

- a. "All crime punishable by the civil power,<sup>1</sup> the commission of which is brought to the cognizance of the Commanding Officer, should forthwith be notified by the Commanding Officer to the chief constable of the county or borough, that the same may be duly investigated by the police and punished by the ordinary criminal tribunals of the county or borough."
- b. "In cases of murder, where the accused and the deceased were *both* subject to the Mutiny Act, the Commanding Officer should request the magistrates forthwith to transmit a copy of depositions taken before them to the Secretary of State, that the case may (if he deems it expedient that a more speedy trial of the accused should be had than the usual

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<sup>1</sup> When a soldier is sentenced to imprisonment by the civil power for an offence of a disgraceful or felonious nature, a full report of the case, accompanied by a copy of the conviction,—showing the prison to which the man may be committed,—together with extracts from the Court-martial and defaulter books, and a descriptive return on W. O. Form 432, is to be transmitted to the Adjutant General, through the General or other officer commanding the district or station,—who will make such observations as he may think it necessary to furnish.

C. O.'s in complying with these instructions will state whether in their opinion the soldier has committed the offence with a view to his obtaining his release from the army, and whether they recommend that he should be discharged or retained in the service, with their reasons for such recommendation.

1871. G. O. 17 and 85.—CIVIL CONVICTIONS.

course of practice allows) be prepared for trial by the solicitor to the Department under the jurisdiction in 'Homicides Act, 1862.' "

- c. "Where Commanding Officers or the men under their command are made defendants in legal proceedings, whether of a civil or criminal nature, the defence thereof must be conducted upon the sole responsibility of such defendants.
- d. "When in such cases any claim is preferred to the Secretary of State for assistance in the defence or for the reimbursement in the cost thereof, it must clearly be shown with reference to the declaration or indictment (of which a copy should be sent with the application) that the act complained of was one sanctioned by competent authority or clearly within the prescribed course of the defendant's duty."
- e. "Until the Secretary of State directs the solicitor to the Department to take charge of the defence or to reimburse the cost, he will incur no responsibility whatever on account thereof."



## APPENDIX (B.) F.—CHAP. II. PAR. 37.

(Referred to in par. 9.)

FORM OF RECORDING THE PROCEEDINGS OF A GENERAL COURT-MARTIAL, including some of the more unusual incidents which may occur to vary the ordinary course of procedure, with instructions for the guidance of the Court.<sup>1</sup>

PROCEEDINGS of a GENERAL COURT-MARTIAL, held at  
on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_, by order of  
\_\_\_\_\_ Commanding \_\_\_\_\_, dated the  
day of \_\_\_\_\_, 18 \_\_.

PRESIDENT.

\_\_\_\_\_

MEMBERS.

<i>Rank.</i>	<i>Name.</i>	<i>Regiment.</i>
_____	_____	_____
_____	_____	_____
_____	_____	_____

\_\_\_\_\_, Deputy Judge Advocate.

<sup>1</sup> At \_\_\_\_\_ o'clock the Court opens.

First day.

[No.—Rank—Name—Regiment] is brought a prisoner before the Court.

The order for convening the Court, and the warrants appointing the President and Deputy [or, Officiating] Judge Advocate are read.

The names of the President and Members of the Court are read over in the hearing of the prisoner, and they severally answer to their names.

Question by  
the President  
to the Prisoner.

Do you object to be tried by me as the President or by any of the officers whose names you have heard read over?

Answer.

<sup>1</sup> N.B.—For General and District Courts-martial, W. O. Form 642, to be obtained from General Officers commanding, is to be used in accordance with these instructions. The proceedings of Regimental Courts-martial should be written on the paper, which is issued by the War Office as the authorised form of Court-martial Book, viz., W. O. Book 89. Courts-martial convened by order of officers commanding brigade depots are to be designated "Regimental Courts-martial."

struction.—*The Questions are to be numbered throughout consecutively in a single series. The letters Q. and A. in the margin may be for "Question" and "Answer" respectively.]*

VARIATIONS.

CHALLENGING PRESIDENT.

*Answer.*—I object to  
*Question to the Prisoner.* —  
your objection.

*Prisoner.*—  
The prisoner in support of his  
objection requests permission to

is called into Court,  
is questioned by the prisoner.

The Court is cleared.

*Decision.*—The Court, by a ma-  
jority of two-thirds, disallow the  
objection. *Or,*

The Court suspend their pro-  
ceedings, and refer the prisoner's  
objection to the convening officer.

At o'clock the Court re-  
opens their proceedings, and a  
decision (&c.) is read to the prisoner,  
and attached to the  
proceedings.

3.—*The Judge Advocate can-  
not object to by the prisoner.*

CHALLENGING MEMBER.

*Answer.*—I object to  
*Question to the Prisoner.* —  
State your objection to  
*Prisoner.*—

The prisoner, in support of his  
objection to requests  
permission to call , &c.  
&c.

The Court is cleared.

*Decision.*—The Court disallow  
the objection.

The Court is reopened, and the  
above decision is read to the  
prisoner.

*Decision.*—The Court allow the  
objection.

The President informs  
that he is not required to serve on  
this Court-martial.

The Court is re-opened and the  
above decision is made known to  
the prisoner.

*New Member.*—(*Rank—Name  
—Regiment*) takes his place as a  
member of the Court.

*Question to Prisoner.*—Do you  
object to be tried by  
as a member of this Court-martial?

*Answer.*—  
(*Any objection is dealt with as  
in the case of an original member.*)

President, Members, and Judge Advocate are duly sworn.

The Prisoner [*No.—Rank—Name—Regiment*] is arraigned  
on the following

CHARGE.

\_\_\_\_\_ you guilty or not guilty of the charge against you, which  
I have heard read ? \_\_\_\_\_

Charge.  
Question to the  
prisoner.  
Answer.

[Instructions.—1. *It is generally advisable that the witness ordered out of Court at this stage of the proceedings.*

2. *All proceedings of the Court, except when it is cleared for deliberation, are to take place in presence of the prisoner.*

3. *No Court-martial should proceed to trial until they have satisfied themselves of their competence to deal with the charge, both as respects their jurisdiction and the precision with which the charge is worded.]*

#### VARIATIONS.

1. The prisoner not pleading [refusing to plead] to the above charge the Court enter a plea of “not guilty.”

2. *Plea.*—The prisoner pleads (in bar of trial).  
The Court disallow the plea in bar of trial, and require the prisoner to plead to the charge.

*Question to the Prisoner.*—Have you any evidence to produce in support of your plea?

*Answer.*—

(*Witness examined on oath.*)

The Court are of opinion that the prisoner has not [has] substantiated his plea, and in consequence proceed with the trial [do therefore adjourn until further orders].

accusation.

(3). (*Rank—Name—Regiment*) appears as Prosecutor, and reads the following address, which is marked \_\_\_\_\_, signed by the President, and attached to the proceedings.

[Instructions.—*If possible, no officer who is to be called as a witness is to be appointed to act as prosecutor. When the prosecutor is required to give evidence he must be sworn.*]

The Prosecutor proceeds to call witnesses.

witness

prosecution.

(*Rank—Name—Regiment*) being duly sworn is examined by the Prosecutor.

Cross-examined by the Prisoner.

[Instruction.—*Although a prisoner may have a professional adviser near him during the trial, to advise him on all points, and to suggest writing, the questions to be put to witnesses, such adviser is not permitted to address the Court or to examine witnesses orally.*]

Re-examined by the Prosecutor.

Examined by the Court.

Q.

A.

The witness withdraws.

[Instruction.—It is usual to read the whole of a witness's deposition to him before he quits the Court, in order that he may correct any accidental mistake or omission in the recorded minutes. The Court may put questions to witnesses at any stage, but it is preferable to defer them until the examination of the witnesses by the parties to the trial has been concluded.]

#### VARIATION.

The prisoner declines cross-examining this witness.

[Instruction.—In every case where the prisoner does not cross-examine a witness for the prosecution this statement is to be made, in order that it may appear on the face of the proceedings that he has had the opportunity given him of cross-examination.]

Prosecutor.

being duly sworn, is examined by the Second witness  
for prosecution.

(The examination, &c., proceeds as above.)

[Instruction.—There is to be a blank line between the recorded minutes of every two witnesses.]

At                      o'clock the Court adjourn until                      o'clock on  
the                      .

On                      , the                      of                      18                      , at                      Second day.  
o'clock, the Court re-assemble, pursuant to adjournment, present  
the same members as on                      .

Question by  
the President.  
Answer.

What record have you to produce in proof of former conviction against the prisoner?

I produce a verified extract from [or There none].

[See form at the end of this Appendix.]

This document being read, compared with the original, found correct, is marked , signed by the President attached to the proceedings.

[Instructions.—In recording former instances of drunkenness in accordance with the 78th Article of War, the number of such instances as proved by reference to the defaulters' books will be entered in the proceedings. The evidence on this head is to be given by the officer in duty it is to prove former convictions, and in the following terms (G. O. 60, 1869).

"On reference to the [regimental, troop, battery, or company] defaulter's book now laid before the court, it appears that the prisoner's name has been recorded therein for the crime of drunkenness times his enlistment."

Is the prisoner under any sentence at the present time?

What is the prisoner's general character?

What is his age?

What is the date of his attestation?

What service is he allowed to reckon towards discharge?

Is the prisoner in possession of any decorations or honours or rewards?

[Instruction.—In a case of desertion it is to be asked and recorded whether the prisoner surrendered or was apprehended.]

The Court is again cleared.

#### SENTENCE.

Sentence.

(9). The Court sentence the prisoner (No. —, Rank —, Name —, Regiment —.)

[Instruction.—The sentence is to be marginally noted in every copy of the proceedings (G. O. 72, 1869).

Death.

a. To suffer death by being shot [hanged].

Re-examined by the Prisoner.

Q.

A.

Examined by the Court.

Q.

A.

The witness withdraws.

(5). The prisoner reads an address, which is marked \_\_\_\_\_, signed \_\_\_\_\_, by the President, and attached to the proceedings. Close of the defence.

[Instruction.—If necessary the Court may now be adjourned to enable the prosecutor to prepare his reply; the fact of adjournment being recorded as before.]

(6). The prosecutor reads the reply, marked \_\_\_\_\_, which is signed by the President, and annexed to the proceedings. Reply.

[Or the prosecutor declines making a reply.]

The Court adjourn until \_\_\_\_\_, to enable the Deputy Judge Advocate to prepare his summing up.

(7). The Court re-assemble on \_\_\_\_\_, and the prisoner being present the Deputy Judge Advocate reads the summing up, which is marked \_\_\_\_\_, signed by the President, and attached to the proceedings. th day  
Summing up.

The Court is cleared for the purpose of considering the Finding.

#### FINDING.

The Court find that the Prisoner (No.—Rank—Name—Regiment) is not guilty of the charge; Finding.  
Not guilty.

OR,

is guilty of the charge [all the charges]. Guilty.

OR,

is guilty of the first charge and guilty of the second charge with the exception of \_\_\_\_\_

OR,

is not guilty of desertion, but is guilty of absence without leave.

[Instruction.—In all cases when the Court acquit the Prisoner, the Finding is to be recorded in simple terms "Not Guilty." If on the trial of a commissioned officer they desire to acquit the Prisoner honourably, they are to state so in a separate letter.]

#### PROCEEDINGS BEFORE SENTENCE.

(8). The Court being re-opened, the Prisoner is again brought before it.

(Rank—Name—Regiment) is duly sworn.

OR,

To forfeit the annuity [gratuity, medal, or decoration, *here specify each*] which has been granted to him. (G. O. 72, 1869.)

OR,

To forfeit all or any advantage as to pension which he has earned by past service.

OR,

To forfeit all right to Good Conduct pay, and to pension on discharge, whether in respect of past or future service.

N.B.—In accordance with the 117th Art. of War, an offender may be sentenced to all or any of these forfeitures.

[Instruction.—*The Medals are to be described.*]

Discharge  
with ignominy.

The Court do further sentence him to be discharged with ignominy from Her Majesty's Service.

Signed at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_ 18 .

(Signature)

(Signature)

Judge Advocate.

President.

[Instruction.—*Space of at least half a page is to be left for the remarks of the confirming officer.*]

(10). Confirmed,

OR,

[I confirm the finding and sentence of the Court, but [mitigate] remit \_\_\_\_\_]

Date.

(Signature of confirming authority.)

I hereby approve [As Civil Governor I further approve] the sentence of the Court upon (No. \_\_\_\_\_ rank and name of prisoner) on behalf of Her Majesty.

(Date.)

(Signature of Civil Governor.)

N.B.—This approval on behalf of Her Majesty is equally necessary to the carrying into effect of a capital sentence in those cases where the confirming authority also administers the civil government.

REVISION.

(11). On \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, at \_\_\_\_\_ o'clock, the Court re-assemble by order of \_\_\_\_\_ for the purpose of reconsidering their \_\_\_\_\_.

Present the same members as before.

The letter [order or memorandum] containing the instructions to

the Court and the reasons of the revising authority for requiring a revision of the finding (*or* sentence) is read, marked signed by the President, and attached to the proceedings.

The Court having attentively considered the observations of the revising officer and the whole of the proceedings, Revised finding.

a. do now revoke their former finding, and are of opinion, &c.,

OR,

b. do now revoke their former sentence, and now sentence the prisoner, &c. &c., Revised sentence.

OR,

c. do now revoke their former finding and sentence. The Court are now of opinion, &c. &c., Revised finding.

OR,

d. do now respectfully adhere to their former sentence [finding and sentence]. Revised sentence.

Signed at \_\_\_\_\_, this \_\_\_\_\_, day of \_\_\_\_\_ 18 \_\_\_\_.

(Judge Advocate.)

(President.)

[Instruction.—*No additional evidence for prosecution or defence can be received on the revision, and no portion of the original minutes can be altered.*]

2. *When Courts-martial are re-assembled for the purpose of revising their finding, and when any alteration therein is made, it is absolutely necessary that the sentence in such revised finding shall be given afresh, and it is not sufficient for the Court to state that they adhere to their former sentence in such cases.*—(G. O. 106, 1869.)

#### *Recommendation to mercy, &c.*

(12). [Instruction.—When the Court have passed judgment, and desire to recommend the prisoner to the favourable [merciful] consideration of the confirming authority; or to remark on the conduct of the parties before them; or on the manner in which a particular witness has delivered his testimony, &c. &c., they are to embody their views in a separate letter, to be signed by the President, and forwarded with the proceedings to the confirming authority, or to the Judge Advocate General, as the case may be.]

#### (13). FORM OF SUMMONS TO A CIVIL WITNESS. [W. O. FORM 643.]

To  
Whereas a \_\_\_\_\_ court-martial has been ordered to assemble  
at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, for the trial of  
\_\_\_\_\_, of the \_\_\_\_\_ regiment, I do, by virtue of the



authority vested in me by the Mutiny Act, summon and require you A. B. to attend, as a witness, the sitting of the said Court at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, at \_\_\_\_\_ o'clock in the forenoon [and to bring with you the documents hereinafter mentioned, namely \_\_\_\_\_], and so to attend from day to day until you shall be duly discharged; whereof you shall fail at your peril.

Given under my hand at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 18 .

(Signature)

Deputy Judge Advocate  
(or President).

(14). FORM OF CERTIFICATE OF PREVIOUS CONVICTIONS.

Certified Copy of an Entry [or Entries] of the previous convictions by Courts-martial [or by Civil Court] of No. \_\_\_\_\_, A. B., \_\_\_\_\_ of the \_\_\_\_\_, taken from the Court-martial Book [or Regimental, or Company Defaulter Book, as the case may be], of the Regiment.

Description of Court-martial by which tried.	Place and Date of Trial.	Charges upon which tried.	Finding and Sentence of the Court.	Minute of Confirmation.	Sentence whether inflicted or remitted.

Authenticated by \_\_\_\_\_ (here the signature of the Officer, certifying to the correctness of the extract, is to be given).

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 18 .

(To be signed by the President, and attached to the proceedings.)

## APPENDIX (C.) G.—CHAP. II.

## FORMS OF CHARGES.

THE FOLLOWING FORMS OF CHARGES ARE TO BE USED AS OCCASION MAY REQUIRE, IN ARRAIGNING PRISONERS BEFORE A COURT-MARTIAL.

[N.B.—The references apply to the Articles of War for the year 1873.]

## MUTINY.—(15th Sec. M. Act. 36th Art. of War.)

1. Having on or about the <sup>1</sup> 18 , at <sup>1</sup> , begun  
[excited, caused, or joined in, *as the case may be*] a mutiny in the  
regiment.

OR,

2. Having, on or about the 18 , at when  
present at a mutiny taking place in the regiment, not used his  
utmost endeavour to suppress the said mutiny.

OR,

3. Having at come to the knowledge of a mutiny  
[or an intended mutiny, *as the case may be*] in the regiment,  
and not having [without delay] given information thereof to his  
commanding officer.

OR,

4. Having, on or about the , at , conspired with  
to mutiny.

<sup>1</sup> It is necessary in every indictment or information to allege a time as well as a place for the commission of the offence, in order that the accused may have every opportunity of meeting the charge:\* but error in the averment of time or place is not now, as a general rule, material in criminal proceedings, if the offence itself be proved, unless in cases when the precise date of fact is a necessary ingredient. (See 14 & 15 Vic. cap. 100, sec. 24.) The *essential* points to be stated in an indictment, and with as much *certainty* as possible, are three: First, the name of the prisoner; Secondly, the nature of the act committed, and a statement of the facts by which it is constituted—if an offence against property, a description of the property; and Thirdly, the name of the injured party. The conviction entirely should depend on the material points as proved by the evidence, for no indictment is deemed insufficient for want of the averment of any matter which is unnecessary to be proved.—[W. de B.]

\* Nothing more (see vol. iv. Ad Op., 264).

INSUBORDINATION.—(15th Sec. M. Act. 37th Art. of War.)

5. STRIKING A SUPERIOR OFFICER.

Insubordination, accompanied with personal violence, in having, at \_\_\_\_\_ on or about the \_\_\_\_\_ struck [with his clenched fist, or open hand, or missile, or weapon, as the case may be] \_\_\_\_\_ of the \_\_\_\_\_ the said \_\_\_\_\_ being his superior officer, and being in the execution of his office.

OR,

6. USING OR OFFERING VIOLENCE AGAINST A SUPERIOR OFFICER.

Insubordination, accompanied with personal violence, in having at \_\_\_\_\_ on or about the \_\_\_\_\_ offered [or used, as the case may be] violence against \_\_\_\_\_, by [here state the precise nature of the violence used or offered], the said \_\_\_\_\_ being his superior officer, and being in the execution of his office.<sup>1</sup>

7. OFFERING VIOLENCE IN A MILITARY PRISON.

Insubordination, accompanied with personal violence, in having, when confined in the military prison at \_\_\_\_\_, on or about the \_\_\_\_\_ struck [used, or offered<sup>1</sup> violence against, as the case may be] \_\_\_\_\_, of the \_\_\_\_\_, the said \_\_\_\_\_ being a visitor of the said prison [or his superior military officer, as the case may be], and then and there in the execution of his office.

8. DISOBEYING THE COMMAND OF A SUPERIOR OFFICER.—(38th Art. of War.)

Insubordination, in having at \_\_\_\_\_ on or about the \_\_\_\_\_ disobeyed the lawful command of \_\_\_\_\_ his superior officer by [here describe the precise nature of the act of disobedience imputed to the prisoner].

9. USING THREATENING LANGUAGE TO A SUPERIOR.—(41st Art. of War.)

*N.B.—If insubordinate language accompany the act or acts of violence, it should not form the subject of a separate charge, but be stated as a circumstance in the charge alleging the violence: it is essential that the precise language used should be specified in the charge; and if accompanied by gesture the same should be accurately described.*

Insubordination, in having at \_\_\_\_\_ on or about the \_\_\_\_\_ used

<sup>1</sup> By the words "Offer of Violence" is implied any threatening act or gesture amounting to an attempt to use violence.

*N.B.—It has been ruled that a non-commissioned officer while with his regiment or any part of it is, at all times, to be considered in the execution of his office.—(G.O. 12, 1868.)*

threatening language towards his superior officer, in substance and to the effect following, that is to say, "I will take away your life."

#### DESERTION AND ABSENCE WITHOUT LEAVE.

##### 10\*. DESERTION.—(42nd Art. of War, 1st Cl.)

1st. Having deserted<sup>1</sup> from the regiment at on the

*N.B.—If the prisoner made away with, or was otherwise deficient of any of his arms, regimental clothing, appointments, or necessities, it should form the subject of a second charge, viz.—*

2nd. Having at the time stated in the first charge made away with the following articles of his kit (102nd Art. of War), viz.:

*[Here specify the different articles deficient, and in the case of a great coat, its estimated value.]*

*N.B.—If the prisoner re-enlisted into another corps and obtained bounty, a charge should be added as follows:—*

3rd. Having whilst in a state of desertion from the , as stated in the first charge, enlisted into the on or about the , and having by such enlistment fraudulently obtained a bounty of , and also a free kit, value .

##### 10A. ATTEMPT TO DESERT WHEN ON FURLOUGH.

Conduct to the prejudice of good order and military discipline in having, while on furlough at on (or about) the day of , *[here specify the act by which the intention to desert is to be proved]*; for example:—"having taken a passenger-ticket, under the assumed name of A for a steamer then about to proceed to B , with the intention of embarking in the said steamer, and of deserting from Her Majesty's service."

##### 11. ADVISING OR PERSUADING OTHERS TO DESERT.—(44th Art. of War.)

Having at , on or about the *[or between the and ]*, advised *[or persuaded, as the case may be]* private , of the regiment to

<sup>1</sup> Evidence should be given to the Court of the period of absence, of the surrender or apprehension of the prisoner, and other circumstances bearing upon the degree of his offence.

desert from Her Majesty's service, by having in conversation with the said private said to him [*here state the acts done or the words used by the way of advice or persuasion*].

12. KNOWINGLY RECEIVING AND ENTERTAINING A DESERTER.—(44th Art. of War.)

Having at \_\_\_\_\_ on or about the \_\_\_\_\_ received and entertained \_\_\_\_\_ of the \_\_\_\_\_ knowing him to be a deserter, and not having immediately given notice to the proper authority, with a view to cause the said \_\_\_\_\_ to be apprehended.

13. FRAUDULENT CONFESSION OF DESERTION BY A SOLDIER WHILE SERVING.—(46th Art. of War.)

Having at \_\_\_\_\_ on or about the \_\_\_\_\_ made a false statement to his commanding officer, by fraudulently confessing himself to be a deserter from the \_\_\_\_\_ regiment.

14\*. FRAUDULENT ENLISTMENT IN THE ARMY, WHILE ENROLLED IN THE ARMY RESERVE.—(49th Art. of War.)

Having while enrolled in the Army Reserve, on or about the \_\_\_\_\_ day of \_\_\_\_\_ fraudulently enlisted in the \_\_\_\_\_ regiment [*or for general service, as the case may be*], and having in his declaration upon the occasion of such enlistment, fraudulently misrepresented that he was not then so enrolled, thereby obtaining a free kit, value \_\_\_\_\_, and the following moneys, viz. [*here insert particulars of all moneys issued to him in respect of such fraudulent enlistment; taking care not to include daily pay issued to him for service rendered during the period he was doing duty, although fraudulently enlisted*].

14. ABSENCE WITHOUT LEAVE.—(50th Art. of War.)

Having at \_\_\_\_\_, on or about the \_\_\_\_\_ without leave from his commanding officer, absented himself from the \_\_\_\_\_ regiment, and having remained so absent until the \_\_\_\_\_.

OFFENCES IN THE FIELD, CAMP, GARRISON, OR QUARTERS.

16. SLEEPING ON A POST.—(57th Art. of War.)

Sleeping on his post when sentry over \_\_\_\_\_, at [*station*], between the hours of \_\_\_\_\_ and \_\_\_\_\_ o'clock, on or about the \_\_\_\_\_.  
(*Name of the post or guard should be stated.*)

17. LEAVING A POST BEFORE BEING RELIEVED.—(ib.)

Having, before being regularly relieved, left his post when sentry

over (*post or guard to be here stated*), at [*station*], between the hours of      and      o'clock, on or about the      .

18. LEAVING A GUARD OR PIQUET.—(65th Art. of War.)

Having, on or about the      , left his guard [*or piquet, or post, as the case may be*] at      without having first obtained leave from the officer [*or non-commissioned officer*] in command of the said guard [*or piquet, or post*], and for not having returned until      .

[*N.B.—If the offender should not return to his guard or piquet before it is relieved, the latter part of the charge to be worded accordingly.*]

19. BREAKING ARREST OR ESCAPING FROM CONFINEMENT.—(69th Art. of War.)

Having at      , on or about the      , whilst under arrest [*or a prisoner in confinement, as the case may be*] in the      [*here specify the place in which he was confined*], broken his arrest [*or escaped from such confinement, as the case may be*], before he was set at liberty by proper authority.

20. ABSENCE FROM PARADE.—(70th Art. of War.)

Having at      , on or about the      , failed to appear at      , the place of parade appointed by his commanding officer.

21. A COMMANDER OF A GUARD, PIQUET, OR PATROL, SUFFERING A PRISONER COMMITTED TO HIS CHARGE TO ESCAPE.—(73rd Art. of War.)

Having, when in command of [*here state whether a guard, piquet, or patrol*] at      , on or about the      , negligently [*or wilfully, as the case may be*] suffered      , a prisoner committed to his charge, to escape (*or released him without proper authority, as the case may be*).

DRUNKENNESS.

22\*. DRUNK ON DUTY.—(77th Art. of War.)

Having, on or about the      been drunk when on duty, when on the      guard at      [*or on piquet, or when employed as mounted orderly, or on escort duty, as the case may be*].

*N.B.—The name of the guard should always be stated; and if the prisoner was on sentry at the time, the particular post should be inserted in the charge.*

## 23\*. DRUNKENNESS.—(G. O. 72, 1869.)

Having, at \_\_\_\_\_ on or about the \_\_\_\_\_, been drunk.

N.B.—In accordance with the 78th Article of War, a non-commissioned officer can be tried by a regimental or detachment court-martial for an act of drunkenness *not on duty*, but a soldier can only be brought to trial for this offence before a district or garrison court-martial.

## DISGRACEFUL CONDUCT.—(80th Art. of War.)

## 24. FRAUDULENTLY MISAPPLYING PUBLIC MONEY OR STORES.

Disgraceful conduct in having at \_\_\_\_\_, on or about the \_\_\_\_\_, fraudulently misapplied—

a. the sum of \_\_\_\_\_, being public money intrusted to him by \_\_\_\_\_, for the purpose of \_\_\_\_\_ [*here state the facts fully*].

[N.B.—This is applicable to a pay-sergeant making away with money intrusted to him for the payment of his troop, battery, or company.]

b. the following property [*or stores*] belonging to Government, viz. [*here state the property and its value*].

## 25. MALINGERING AND FEIGNING DISEASE.—(81st Art. of War.)

Disgraceful conduct at \_\_\_\_\_, on or about the \_\_\_\_\_, in malingering [*feigning, or producing disease or infirmity, or wilfully doing any act, or wilfully disobeying any orders, thereby producing or aggravating disease or infirmity, or delaying his cure, as the case may be*].

[N.B.—In each case the acts done or omitted to be done, from whence the Court are to draw the inference, that he malingered, &c. &c., should be specified.]

26. WILFULLY MAIMING OR MUTILATING.—(*ib.*)

Disgraceful conduct in having at \_\_\_\_\_, on or about the \_\_\_\_\_, wilfully maimed [*or injured*] himself, by discharging a loaded musket through his wrist [*or inflicting a wound with \_\_\_\_\_, as the case may be*] with intent thereby to render himself unfit for Her Majesty's service.

OR,

## 27. MAIMING OR INJURING ANOTHER SOLDIER.

Disgraceful conduct in having at \_\_\_\_\_, on or about the \_\_\_\_\_, wilfully maimed [*or injured*] Private \_\_\_\_\_, by discharging a loaded musket through the wrist of him, the said Private \_\_\_\_\_ [*or inflicting a wound with \_\_\_\_\_, as the case may be*] with intent thereby to render him, the said Private \_\_\_\_\_ unfit for Her Majesty's service.

## 28. TAMPERING WITH EYES.—(ib.)

Disgraceful conduct in having at \_\_\_\_\_, on or about the \_\_\_\_\_, tampered with his eyes by [*describe the nature of the act supposed to have been done by the prisoner*], with intent thereby to render himself unfit for service.

## 29. STEALING OR FELONIOUSLY RECEIVING.—(ib.)

a. Disgraceful conduct, in having at \_\_\_\_\_, on or about the \_\_\_\_\_, stolen the following property, belonging to \_\_\_\_\_ viz. [*here describe the articles and their value*].

OR,

b. Disgraceful conduct, in having at \_\_\_\_\_, on or about the \_\_\_\_\_, feloniously received the following articles, the property of \_\_\_\_\_, knowing the same to have been stolen, viz. [*here describe the articles and their value*].

[*N.B.—Both these charges are to be used in the cases where a soldier is found in possession of stolen property, and it is not certain that he committed the theft.*]

## 30. OFFENCE OF A FELONIOUS OR FRAUDULENT NATURE UPON A CIVILIAN.—(81st Art. of War.)

Disgraceful conduct, in having at \_\_\_\_\_, on or about the \_\_\_\_\_, fraudulently obtained from \_\_\_\_\_, a civilian, the sum of \_\_\_\_\_, [*or goods, amounting to as the case may be*], by \_\_\_\_\_.

[*Here state the precise nature of the trick or pretence by means of which the money or goods was or were obtained.*]

## 31. INDECENT ASSAULT.—(ib.)

Disgraceful conduct, in having at \_\_\_\_\_, on or about the \_\_\_\_\_, committed an indecent assault upon \_\_\_\_\_.

## 32. PRODUCING FALSE OR FRAUDULENT ACCOUNTS OR RETURNS.—(88th Art. of War.)

Disgraceful conduct, in having on the \_\_\_\_\_ at \_\_\_\_\_, in his capacity of Sergeant-major [*quarter-master sergeant, pay sergeant, or pay corporal, as the case may be*] with intent to defraud, produced to the paymaster [*adjutant, or other officer, as the case may be*] certain false certificates [*or vouchers, or accounts*], as follows:—

[*Here specify the particular nature and description of the certificates or vouchers, or accounts produced.*]



## MISCELLANEOUS OFFENCES.

## 33. MAKING AWAY WITH, &amp;c., ARMS, CLOTHING, INSTRUMENTS, EQUIPMENTS, ACCOUTREMENTS, OR NECESSARIES.—(G. O. 9, 1870, 102nd Art. of War.)

Having at \_\_\_\_\_, on or about the \_\_\_\_\_ made away with [lost by neglect] [sold] [wilfully spoiled] the following articles of his kit, viz. :—

[Here specify the different articles in detail, and the value of each, with the exceptions provided for in the 131st Article of War. In the case of a great-coat its estimated value should always be specified.]

In cases where the evidence for the prosecution may indicate some doubt as to whether the prisoner made away with, lost by neglect, or sold the articles, care must be taken that a separate charge should contain each averment; for instance,—

1st charge.—“having, at \_\_\_\_\_ on or about the \_\_\_\_\_, made away with the following articles of his kit,” &c.

2nd charge.—“having, at \_\_\_\_\_ on or about the \_\_\_\_\_, lost by neglect the following articles of his kit,” &c.

3rd charge.—“having, at \_\_\_\_\_ on or about the \_\_\_\_\_, sold the following articles of his kit,” &c.

[N.B.—It would be competent for the Court to find the prisoner “guilty” of one of the alternative charges, and to acquit him of the remainder; but if the several averments are embodied in one charge, the Court cannot legally convict on that charge.

These instructions are applicable to all cases where an alternative charge is deemed necessary. See also charge 29.]

## 34. WRITING AN ANONYMOUS LETTER TO A SUPERIOR.—(105th Art. of War.)

Conduct to the prejudice of good order and military discipline, in having at \_\_\_\_\_, on or about the \_\_\_\_\_, written and sent to [A.B.], his superior officer, an anonymous letter, which letter contained the following passage [*to be set out in words; if no particular passage can be selected, the whole letter should be set out.*]

## 35. OBSTRUCTING AND ASSAULTING THE POLICE IN THE EXECUTION OF THEIR DUTY.—(ib.)

Conduct to the prejudice of good order and military discipline, in having at \_\_\_\_\_ on or about the \_\_\_\_\_ assisted [soldiers or civilians, as the case may be] in obstructing and

assaulting constables and ,  
in the execution of their duty.

[*N.B. The particulars in every case are to be distinctly specified. If the prisoner actually joined the party he is to be charged with the actual assault and obstruction, whether he was guilty of any violence or not.*]

### 36. FORCING OR STRIKING A SENTINEL.—(*ib.*)

Conduct to the prejudice of good order and military discipline, in having at , on or about the , wilfully struck Private , he being at the time sentry on duty, (*or for having forced a sentry, as the case may be*).

### 37. A NON-COMMISSIONED OFFICER ALLOWING A PRISONER IN HIS CHARGE TO GET DRUNK.—(*ib.*)

Conduct to the prejudice of good order and military discipline, in having at , on or about the , when sergeant [*or corporal*] of the guard, wilfully [*or through neglect*] allowed Private to get drunk when a prisoner under his charge.

### 38. A SENTRY NEGLECTING TO OBEY THE ORDERS OF HIS POST.—(*ib.*)

Conduct to the prejudice of good order and military discipline, in having at , on or about the , when on sentry at No. post of guard, wilfully [*or by neglect, as the case may be*] allowed (*here state the particular fact*), thereby neglecting to obey the orders of his post.

### 39. IRREGULAR CONDUCT ON GUARD.—(105th Art. of War.)

Conduct to the prejudice of good order and military discipline—

*a.* In having, at , on or about the , when on sentry at No. post of guard, delivered over his charge to Private , without a non-commissioned officer being present at the relief; (*or in having, &c. &c., when on guard, relieved Private , who was on sentry at , without being regularly posted at such relief by a non-commissioned officer of the guard*).

OR,

*b.* In having, when corporal of the guard, at , on or about the , wilfully permitted Private one of the guard, to relieve Private , who was then on sentry at No. post, without him, the prisoner, being present at the relief.

### 40\*. RIOTOUS CONDUCT.—(*ib.*)

Conduct to the prejudice of good order and military discipline, i having been—

a. Riotous in the streets [or barracks, as the case may be] at  
 , on or about the , and for resisting and  
 offering violence to the picket ordered to take him into confine-  
 ment.

OR (G. O. 16, 1872),

b. Riotous in the streets at , on or about the ,  
 and remaining absent until the .

[N.B.—When a soldier has been drunk as well as riotous, and it is  
 considered advisable to try him for the drunkenness, a separate charge is  
 to be added on that account.]

41. BREAKING OUT OF BARRACKS AFTER TATTOO.—(ib.)

Conduct to the prejudice of good order and military discipline, in  
 breaking out of barracks, after tattoo, at , on or about  
 the , and remaining absent until the .

42. BREAKING OUT OF BARRACKS WHEN CONFINED THERETO.—(ib.)

Conduct to the prejudice of good order and military discipline, in  
 breaking out of barracks when confined thereto, at ,  
 on or about the , and remaining absent until the .

43. PREFERRING FRIVOLOUS AND UNFOUNDED COMPLAINTS AS TO THE  
 QUALITY OF PROVISIONS OR NECESSARIES.—(ib.)

Conduct to the prejudice of good order and military discipline, in  
 having at , on or about the ,  
 wilfully preferred a frivolous and unfounded complaint by saying  
 [the complaint to be here stated in terms.]

44. FIRING OFF A MUSKET LOADED WITH BALL CARTRIDGE IN HIS BARRACK  
 ROOM.—(105th Art. of War.—G. O. 16, 1872.)

Conduct to the prejudice of good order and military discipline, in  
 having at , on or about the , fired off in  
 his barrack room, a musket loaded with ball cartridge, thereby  
 endangering the lives of other soldiers, and wantonly expending a  
 round of the service ammunition intrusted to his charge, and fur-  
 ther causing barrack damages to the amount of .

45. MILITARY WITNESS REFUSING TO BE SWORN.—(ib.)

Conduct to the prejudice of good order and military discipline, in  
 having at , on or about the , when in  
 attendance as a witness at a Court-martial, held for the  
 trial of , unlawfully refused to be sworn, in order to  
 give his evidence.

46. MILITARY WITNESS REFUSING TO GIVE EVIDENCE.—(ib.)

Conduct to the prejudice of good order and military discipline, in

having at \_\_\_\_\_, on or about the \_\_\_\_\_ after being  
 duly sworn as a witness before a \_\_\_\_\_ Court-martial, then  
 sitting for the trial of \_\_\_\_\_, unlawfully refused to [here  
*state the nature of the refusal, whether to give evidence, or to answer  
 questions, or both, as the case may be*].

47. PERJURY.—(35th Art. of War.)

Perjury in having at \_\_\_\_\_, on or about \_\_\_\_\_, when  
 sworn and examined as a witness before a \_\_\_\_\_ Court-martial  
 when being held for the trial of \_\_\_\_\_, wilfully and corruptly  
 made the following statement material to the question then at  
 issue before the said Court [*here set out the words used*]; the said  
 statement being false, as he, the prisoner, well knew.

APPENDIX (A. TO G.O. 56) H.—CHAP. VII. PAR. 51.

AT THE COURT AT WINDSOR,

*the 22nd day of February, 1870.*

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS there was this day read at the Board a Memorial  
 from the Right Honourable the Lords Commissioners of the  
 Admiralty, dated the 16th February, 1870, in the words  
 following, viz.,

“Whereas it is provided by section 88 of an Act passed in the  
 29th year of Your Majesty's reign, entitled, ‘An Act to make  
 provision for the Discipline of the Navy,’ as follows:—

“Her Majesty's Land Forces, when embarked on board any of  
 Her Majesty's ships, shall be subject to the provisions of this Act,  
 to such extent and under such regulations as Her Majesty, her heirs  
 and successors, by any order or orders in council, shall at any time  
 or times direct.

“And whereas we are of opinion that it would conduce to the  
 better maintenance of order and discipline on board Your Majesty's  
 ships in which Your Majesty's Land Forces may be embarked if  
 the following regulations were established, namely:—

“1. Whenever any of Your Majesty's Land Forces, or any Royal  
 Marines formed into a separate corps or battalion, shall be embarked

as passengers in any of Your Majesty's ships, the officers and soldiers shall, from the time of embarkation, strictly observe the laws and regulations established for the government and discipline of Your Majesty's navy, and shall for these purposes be under the command of the senior officer of the ship as well as of the superior officer of the squadron, if any, to which such ship may belong.

"2. If any officer or soldier shall commit any act against the good order and discipline of the ship in which he is embarked, the commanding officer of the ship may, by his own authority and without reference to any other person, cause him to be put under arrest, or to be confined as a close prisoner, and shall thereupon, if he thinks the case requires it, transmit a report, in writing, of the charges against such officer or soldier to his superior officer, or if there be no senior officer present, to the Commander-in-Chief of Land Forces, in order that the offender may be brought before a Military Court-martial.

"3. If any officer or soldier commits any act which, in the opinion of the commanding officer of troops, requires a trial by court-martial, such commanding officer shall cause him to be disembarked on the first opportunity, or to be removed to a transport ship, and be there proceeded against according to military law.

"No military court-martial shall be held on board any of Your Majesty's ships in commission.

"4. If any private soldier shall commit any act against the good order and discipline of the ship, the commanding officer of the ship shall, if he thinks the case requires the summary infliction of punishment, apply for the concurrence, in writing, of the commanding officer of the troops as to the nature and amount of such punishment, if any, to be inflicted, and upon obtaining such concurrence in writing shall, by warrant under his hand, sentence the offender to suffer such punishment accordingly.

"5. The sentence shall in all respects conform to the provisions contained in the Naval Discipline Act, 1866, relating to summary punishments awarded by commanding officers.

"6. If the commanding officer of the troops shall decline to give his concurrence as aforesaid, he shall state his reasons in writing, and deliver the same to the commanding officer of the ship.

"Your Majesty's Secretary of State for War, and his Royal Highness the Field Marshal Commanding-in-Chief, have signified their concurrence in these Regulations."

Her Majesty, having taken the said Memorial into considera-

tion was pleased, by and with the advice of Her Privy Council, to approve of what is therein proposed; and the Right Honourable the Lords Commissioners of the Admiralty are to give the necessary directions herein accordingly.

(Signed) ARTHUR HELPS.

## APPENDIX I.—CHAP. IX.

### ON EVIDENCE.<sup>1</sup>

It is of importance in trials before Naval and Military Courts-martial to adhere to those rules of evidence which have been established in the Common Law Courts of Criminal jurisdiction,<sup>2</sup> and in considering this subject it will be convenient to treat first of the evidence itself, its nature and degree; secondly, of the persons, the witnesses, by whom the evidence is given; thirdly, to notice in outline some points connected with the reception and treatment of evidence, and the limits within which it should be received; and lastly, to refer to some matters which the Courts judicially notice without proof.

I. In the first place, then, as to the character of the evidence itself, a leading principle of the law of England is that which requires that the best evidence should be produced, and forbids the production of what is known as secondary or derivative evidence, until the sources of primary evidence have been exhausted.<sup>3</sup>

It follows as a corollary from this, that witnesses should be required to depose to facts within their own knowledge, and not those which they have heard only stated by others. Hearsay evidence is, in short, except in comparatively few cases, absolutely excluded. One chief reason amongst others of this is, the impossibility of testing the value or accuracy of such testimony by cross-examination. For every fact against a prisoner should be proved by oath, and in presence of the accused, that he may have the opportunity of cross-questioning the witness as to his means of knowledge and the truth of his statement.

<sup>1</sup> I have been favoured with this note by W. De Burgh, Esq., of the Inner Temple, the author of the work on 'Maritime International Law,' 1868.

<sup>2</sup> Op. of Att. Generals, Vol. II. p. 344; 2 Black. Rep. p. 87.

<sup>3</sup> Smith L. Cas., Vol. ii. p. 606; Taylor on Ev., Vol. i. p. 428, ed. 1872.

Derivative, or second-hand evidence, of which it has been said that mere rumour is hearsay in its worst form,<sup>1</sup> cannot then, speaking generally, be received. To this rule, however, there are some exceptions, a few only of which it is material to notice here. In the first place as regards oral testimony, the evidence of a witness examined under oath on a former trial between the same parties, and since deceased, is receivable and may be proved by the testimony of a person who heard it, or by notes made at the time, provided such evidence relates to the same subject, or involves substantially the same question.<sup>2</sup> Secondly, declarations made by persons under the conviction of their impending death;<sup>3</sup> an exception, however, which, resting as it does on a presumption arising out of the solemnity of the occasion, is not allowed weight in the case of declaration of a child of tender years; unless, indeed, he appears to have had that amount of religious knowledge which would render his evidence receivable. Where the witness is proved to be dead, secondary evidence of his statements on oath would of course be admissible. Other instances of the rule which rejects secondary evidence of oral testimony, so long as the witness can himself be called, are where the witness is out of the jurisdiction of the Court, where he is insane or permanently sick, and where he is kept out of the way by the contrivance of the opposite party.

As respects *written instruments*, the rule which excludes substitutionary evidence as long as the original evidence is attainable, is enforced with especial strictness; the rule of law being that the contents of a written document which is capable of being produced must be proved by the document itself, and not by parol, or verbal, evidence. The same principle also operates to the exclusion of writings which the law considers as entitled to less weight than those which ought to be forthcoming. An original document, for instance, must, generally speaking, be produced at the trial, and a mere *copy*, however accurate, will not in the first instance be admissible. Neither can parol evidence be substituted for any instrument which the law requires to be in writing, such as a public Record; nor in place of any contract or agreement which the parties themselves have put in writing; for in such a case, as has been observed,

<sup>1</sup> Best on Ev., p. 629.

<sup>2</sup> Taylor on Ev., Vol. i. p. 455.

<sup>3</sup> Dying declarations are only admissible when made by a person who is under the influence of an impression that his dissolution is impending. There must be no hope not only of ultimate recovery, but of a prolonged continuance of life. Any hope of recovery, however slight, existing in the mind of the deceased at the time of the declaration being made, would render the evidence of such declarations inadmissible. Roscoe's Crim. Ev., 7th ed. p. 32. See *R. v. Jenkins*, 38 L. J. M. C. 82. *Reg. v. Stale*, 12 Cor. Crim. Cas. 168.

the written agreement is of the essence of the transaction, and is its only appropriate evidence.<sup>1</sup> Nothing, for example, can be added to an agreement for a lease by verbal statements; the parties must stand or fall by the writing.<sup>2</sup> Oral testimony cannot, again, be substituted for any document the existence or the contents of which are disputed, and which is material to the issue between the parties. But secondary evidence of the contents of a written document may be given in a trial where it is proved that diligent search has been made for the original by the party in whose custody it would properly be, and that he is nevertheless unable to find it. And where the document is in possession of the opposite party, and notice to produce has been served upon him, then if he fails to produce it at the trial, the party seeking to adduce it in evidence, may after due proof of the service of the notice to produce, proceed to give secondary evidence of its contents. So if a letter material to the issue has been lost, evidence of its contents may be given either by the writer of the letter himself speaking from memory, or by a copy, or by a duplicate writing taken from an autograph at one impression by means of a machine. But all these methods of proof are secondary evidence only, of the same value—for in secondary evidence there is no *degree*—and therefore of less weight than the original manuscript, which alone, as being primary evidence, is considered to afford the most complete proof of the facts in question.<sup>3</sup>

Where, however, admissions, or acts equivalent to admissions, are made by one of the parties, although relating to the contents of a deed or other instrument directly in issue in the cause, such statements or acts are admissible as primary proof, without notice to produce, or accounting for the absence of, the written instrument. And generally the better opinion would seem to be that when the writing does not fall within the classes specified, no reason exists why parol evidence, even when written statements have passed between the parties, should be excluded.<sup>4</sup>

It may also be here stated as the result of the authorities, that while oral evidence can never be admitted to alter, vary, or contradict a written agreement, it is admissible to show that *no such agreement at all* was entered into.<sup>5</sup> Oral testimony also is admissible to explain an agreement in writing in the following cases: First, to explain foreign words, or technical words of trade or custom.

<sup>1</sup> Per Abbott, C. J., *R. v. Castle Morton*, 3 B. and A. p. 590.

<sup>2</sup> Lord St. Leonards' 'Handy Book,' p. 193, ed. 1870.

<sup>3</sup> Sec. 4 Ex. T. No. 1, p. 30.

<sup>4</sup> Taylor on Ev., Vol. i. p. 416.

<sup>5</sup> Per Erle, Ch. Justice, in *Pyne v. Campbell*, 6 E. and B. p. 374.



Secondly, to explain a difficulty created by extrinsic circumstances in applying the terms of a written instrument to such extrinsic circumstances; in other words to explain a latent ambiguity, as for example to ascertain to which of two persons a given description in a will applies.<sup>1</sup> And lastly, evidence of usage or custom is admissible to explain and control, but not to contradict, an instrument in writing.

These are in outline some of the leading principles which are likely to arise in connection with the rule forbidding the admission of what is known as hearsay or secondary evidence, which is, in other words, any evidence of whatever kind which falls short of that degree of proof which affords the greatest certainty of the fact in dispute.

II. As respects the persons, the witnesses, by whom evidence is given, it is to be observed that the inclination of modern judges, and the tendency of recent legislation, is in favour of receiving the evidence of witnesses of all classes whatsoever, leaving its *value* to be estimated by the jury, or the Court-martial, as the case may be. Objection, in short, cannot now be sustained against the competency, but only against the credibility of a witness. Under the law of England, however, certain grounds of incompetency still exist, and these are three in number. First, incompetency from want of reason or understanding; secondly, incompetency from want of religion; and thirdly, incompetency from interest. Of these classes of persons it may be observed that the first includes idiots from their birth; secondly, those who from sickness or other cause have lost their memory or understanding; thirdly, those who as lunatics, for example, sometimes have understanding and sometimes not; and lastly, the man who by his own act weakens, or wholly deprives himself of, his memory or understanding. These four classes of persons are incompetent witnesses, until the cause of incompetency is, if possible, removed.<sup>2</sup>

As to the evidence of children, immaturity of intellect is as much a ground of incompetency as where the understanding has failed from disease; but it may be shortly stated that where a material witness is of tender years, the Judge or Court usually examines him with a view of ascertaining whether he is aware of the nature and obligation of an oath, and the consequences of perjury. The requisite degree of knowledge on these points is presumed in law to arise at the age of fourteen; but the presence of sufficient intelligence and education in persons of far earlier age will operate

<sup>1</sup> *Douglas v. Fellowes*, Kay's Rep. p. 120; *Webb v. Byng*, 1 K. and J. p. 580.

<sup>2</sup> *Phillips and Arnold on Ev.*, p. 4; *Best on Ev.*, p. 298.

to set this presumption aside, so as to admit of receiving their testimony. The rule of law is that no infant under seven is liable for crime, and although between seven and fourteen an infant is deemed incapable of crime, this presumption may be rebutted by evidence of malice and knowledge of the guilt of the act committed.

With regard to incompetency from want of religious knowledge the same principles apply to an adult deficient in the necessary amount of religious instruction, as in the case of a child. As to incompetency for want of religious *belief*, it may be sufficient here to state as the result of the authorities, that every person is admissible to give evidence who believes in a Divine Being, the avenger of falsehood and perjury in man, and who consents to invoke by some binding ceremony the attestation of that Power to the truth of his deposition.<sup>1</sup> The witness is to be sworn in that form which he considers most binding on his conscience, and if he allows himself to be sworn in such form without objecting he is liable to be indicted for perjury if his testimony be false.<sup>2</sup>

A third species of incompetency is that arising from *interest* in the matter in question. This kind of incapacity has however been so far modified by recent legislation<sup>3</sup> as that it may now be laid down that competency is the rule, and incompetency the exception. It is upon this principle that the evidence of an accomplice is received; the only ground on which the testimony of such a person could be objected to being the obvious interest he would have in saving himself from punishment by securing the conviction of the accused. A confession therefore by a witness of any conduct, however infamous, goes only to his credit, not to his competency; even a person convicted of perjury may now be admitted as a witness; incapacity from giving evidence on the ground of having been convicted of crime being done away with by statute (6 & 7 Vic. c. 85, s. 1).<sup>4</sup>

With respect to confessions made by a prisoner, the rule of law briefly is this: that confessions, whether judicial or extra-judicial, are *prima facie* admissible in evidence, if made voluntarily without

<sup>1</sup> Best on Ev., p. 227; Omichund v. Barker; 1 Smith L. Cas. p. 340.

<sup>2</sup> Best, p. 230. Under a recent statute (32 & 33 Vic. c. 68) provision is made (sec. 4) for persons objecting to take, or being incompetent to take, an oath; in which case, if the presiding judge is satisfied that the taking of an oath would not bind the witnesses' conscience, a "solemn promise and declaration" is substituted therefor. Such witnesses giving false evidence are liable to be convicted for perjury.

<sup>3</sup> 6 & 7 Vic. c. 85.

<sup>4</sup> See rule as laid down by Erle, J., Dawkins v. Lord Rokeby. See also as to privilege of witnesses, Revis v. Smith, 8 Com. B. p. 126; Henderson v. Broomhead, 4 Hurlstone and N. p. 569.

fear or threat, or hope held out of favour. But they are inadmissible if made in consequence of some inducement of a temporal nature, having reference to the charge, held out by a person in authority; or if extorted by any representation operating on the mind of the accused, to induce him to make the confession.<sup>1</sup>

As to husband and wife, the old rule was that the husband could not be a witness for or against his wife, nor the wife for or against the husband.<sup>2</sup> Now, however, by a recent statute (16 & 17 Vic. c. 83, s. 4, and 32 & 33 Vic. c. 68) it is provided that the husbands and wives of parties are admissible as witnesses, except in any criminal proceedings, or in proceedings instituted in consequence of adultery. Husband and wife cannot therefore testify in a criminal case either for or against each other, except on a trial for treason, or where the very nature of the offence charged, *e.g.* a personal wrong done to the wife, necessitates a qualification of the rule. And it has recently been decided by the Court for the consideration of Crown cases reserved, that a wife's evidence in favour of prisoners who were charged with an offence (theft), and her husband in the same indictment for receiving the goods with guilty knowledge, is not admissible.<sup>3</sup>

The law of England admits as sufficient the testimony of one *credible* witness, except in trials for perjury—for there is, in that case, only one oath against another—<sup>4</sup> in cases of felonious, advised, and open speaking against the Queen, and in certain cases of high treason and misprision of treason.<sup>5</sup> The oaths of two credible witnesses are also required to sustain a conviction under the 87th clause of the Mutiny Act relating to quartering of soldiers. But with these exceptions it has been ruled that an accomplice alone is a competent witness (although it is prudent that his testimony should be corroborated in some material fact) and a conviction sustained by such testimony alone would be strictly *legal*. It is true that the evidence of an accomplice comes "sullied with contamination;" but this testimony may be confirmed by the clearness and

<sup>1</sup> Best, Evidence, 4th ed. p. 685. As to the admissibility of evidence in the form of depositions made and sworn by a prisoner before trial before a court of inquiry into the charge—whether arson or not—see *Reg. v. Coota*, P. Council Rep., 18 March 1873.

<sup>2</sup> Broome and Halley, Com., Vol. iv. p. 448.

<sup>3</sup> "*Regina v. Thompson*," affirming "*Regina v. Thompson*," L. R., 1 C. C. R. p. 349. See Archbold, Pl. and Ev. Crim. Cas. p. 275.

<sup>4</sup> *R. v. Muscot*, 10 Mod. p. 193; and see per Erle, C.J., in *Reg. v. Shaw*, L. and C. p. 579.

<sup>5</sup> 1 Ed. VI. c. 12; 5 & 6 Ed. VI. c. 11; 7 Wm. III. c. 3; Broome Com. Vol. iv. p. 450.

consistency of his narrative.<sup>1</sup> The evidence of an informer, whatever may be its merits or demerits, is not that of an accomplice.<sup>2</sup>

III. As respects the reception and treatment of evidence, there are some general principles which it is important to bear in mind. (a.) In the first place, the testimony should be relevant, that is to say, confined strictly to the point at issue. A collateral inquiry into other facts and circumstances should only be received when they bear upon the charge and constitute presumptive proofs. This rule is founded, as observed by a learned person, on common justice, "for no person," says an old writer, "can be expected to answer, unprepared and at once, for every action of his life; few even of the best men would choose to be put to it."<sup>3</sup> It is on this principle that, on consideration of a charge of mutiny, or exciting to mutiny, the acts or declarations of co-mutineers or letters written by them, may, as in the analogous case of trials for conspiracy before courts of civil judicature, be received in evidence against a particular individual, testimony having been previously offered of the existence of the conspiracy and of the connection of the accused therewith. For it is an established rule that when several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is in contemplation of law the act of the whole party, and, therefore, the proof of such act will be evidence against any of the others who were engaged in the same general conspiracy, without regard to the question whether the prisoner is proved to have been concerned in that particular transaction.<sup>4</sup> (b.) Secondly, it is sufficient if the substance or the material part of the charge be proved, the law no longer requiring that every circumstance, however minute, should be established precisely as laid in the indictment. This is the principle which lies at the root of the Criminal Justice Improvement Act,<sup>5</sup> under which in indictments for murder, for

<sup>1</sup> Broome Com., Vol. iv. p. 459; Phillips and Arnold on Ev., Vol. i. p. 89, 10th ed.; Vol. ii. Say Evid. pp. 860-1.

<sup>2</sup> Phillips and Arnold, Vol. i. p. 102. If the case against an accused person rests upon the unsupported evidence of an accomplice, the direction commonly given by the judge to the jury is, that in the absence of corroborative evidence they ought to acquit the prisoner. If, however, the case is left to the jury on such direction, and they find a verdict in defiance thereof, the verdict would be good; for although, as stated in the text, evidence confirmatory of that given by an accomplice is proper, it is not, in strict law, essential. See Archb. Crim. Pl., p. 247, 16th ed.

<sup>3</sup> Foster, Discourse of High Treason, Broome Com., Vol. iv. p. 449.

<sup>4</sup> Phillips and Arnold on Ev.

<sup>5</sup> 14 & 15 Vic. c. 100, better known perhaps as Lord Campbell's Act.

example, or manslaughter, it is no longer necessary to specify with technical exactness the means by which the injury was inflicted, but the prisoner may be convicted if it be proved, to use the language of the statute, that "the defendant did feloniously, wilfully, and of malice aforethought kill and murder" the deceased.<sup>1</sup> Similarly, an offender indicted for felony may be found guilty, if it appears that he did not complete the offence charged, of an attempt to commit the same, and shall be liable to the same consequences as if charged with and convicted of the attempt only. So—to select examples connected with military offences—on a charge of desertion, absence without leave may be found, or if the charge is one of offering violence to a superior officer in the discharge of his duty, the prisoner may be convicted of offering violence only, and a punishment proportionate to the latter offence may be awarded. And, finally, on the same principle that it is sufficient to prove the substance of the issue, it has been held that it is not necessary to prove the time at which the offence was committed precisely as laid, unless in cases where time is of the essence of the offence: nor will any judgment, indictment, or information for any felony or misdemeanour be stayed or reversed for stating the time at which the offence was committed imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information; or on an impossible day; or on a day that never happened.<sup>2</sup> And a similar rule obtains in cases of indictment for high treason.<sup>3</sup>

IV. It is material to notice in this place, as bearing on the law of circumstantial evidence, what is known as a presumption of law, a term which may be defined to be an inference which is drawn by the law from certain states of facts, or condition of persons, and which is presumed to be true until the contrary be shewn; or, in other words, a presumption is where some facts being proved, another follows as a natural or very probable conclusion from them, so as readily to gain assent from the mere probability of its having occurred, without further proof.<sup>4</sup>

It is, for example, a well-known principle of the law of England, which herein seems to be in agreement with the law of Nations and natural justice, that every accused person is presumed to be innocent until he is proved to be guilty. But although there is this general presumption in favour of innocence, yet if an act unlawful in itself is committed, the law, acting on a similar principle, assumes such act to have been wrongfully intended until

<sup>1</sup> Sec. 4.

<sup>2</sup> See 7 Geo. IV. c. 64, s. 20; 14 & 15 Vic. c. 100.

<sup>3</sup> Phillips and Arnold on Ev., Vol. i. <sup>4</sup> Austin, Jurisprudence, Vol. ii. p. 74.

the contrary be shewn. "Where," to use the words of Lord Mansfield, "an act in itself indifferent, if done with a particular intent becomes criminal, then the intent must be proved and found; but when the act is in itself unlawful, the proof of justification or excuse lies on the accused, and in failure thereof the law implies a criminal intent."<sup>1</sup> And, similarly, every sane man of the age of discretion is presumed to contemplate the natural and probable consequences of his own acts, and if such acts are proper to effect a crime a guilty intention is, on this principle, implied by law. The intent to kill, for example, is conclusively inferred from the deliberate and violent use of a deadly weapon, or to defraud if such would have been the natural result of the act if successful. And the law will not relax this rule even when the accused person did the act while under the influence of voluntary drunkenness, and therefore without premeditation; for it is well settled, as a general principle bearing on the operation of intoxication upon the commission of crime, that a man voluntarily drunk is not excused from crime, although the fact of drunkenness may sometimes be taken into consideration where intention is a material element in the offence.

Other illustrations of the effect in criminal law of this principle of evidence may here be given. The possession of stolen property, for example, *recently* after the theft, raises the presumption—which if unexplained by direct evidence or by character, is regarded as conclusive—that the possessor is either the thief or has received the goods with guilty knowledge. And this inference may be so strong as to render unnecessary any direct proof of what is called the *corpus delicti*. If a man, for instance—to adopt the apt illustration of a very learned judge—were to go into the London Docks quite sober, and shortly afterwards were found very drunk in one of the cellars in which several gallons of wine were stored, "I think," said the late Mr. Justice Maule, "that this would be reasonable evidence that the man had stolen some of the wine, though no proof were given that any particular vat had been broached, or that any wine had actually been missed."<sup>2</sup> And the same rule, or presumption, applies to all cases, even the most penal. Thus in an indictment for arson the proof of property in the house at the time of burning being soon afterwards found in the prisoner's possession, raises the presumption of his presence and concern in the offence; and a similar conclusion would be drawn in the case of murder accompanied by robbery. These examples, and others which might easily be adduced, involve, it

<sup>1</sup> *Rex v. Woodfall*, 5 Burr. 2667.

<sup>2</sup> *Rex v. Barton*, Pearce and D. p. 284.

may be here observed, the well-known distinction which, especially in criminal jurisprudence, is of such importance, that, namely, between *direct* and *circumstantial* evidence; the former being the evidence of those persons who have actually seen the commission of the crime, the latter the testimony of witnesses who depose to facts, or the conclusion drawn by law from such facts, which inferentially fix the crime on the person accused.

Lastly, it is a maxim of civil as well as of criminal protection, that *ignorantia juris neminem excusat*, no ignorance of the law will be admitted as an excuse for crime, inasmuch as the law conclusively presumes every person, until proved to be insane, above the age of fourteen, to be acquainted with the criminal as well as civil, the common as well as the statute law of the land.<sup>1</sup> And the *reason* of this rule, so contrary as it is no doubt to fact in a vast number of cases, is not only that the legal rights and liabilities of parties may be determined as accurately as possible, but because if such a rule did not obtain, the plea of not knowing the law would be almost universally employed as a defence. "Every man," said Lord Ellenborough, "must be taken to be cognizant of the law, otherwise there is no saying to what extent the excuse of ignorance may not be carried. It would be used in almost every case,"<sup>2</sup> and the same rule in the case of military persons and military offences would no doubt be held to apply to the knowledge of the Military Law on the part of Officer and Soldiers. Even Foreigners, on the same principle, charged here with offences which are not such in their own country, have not been allowed to plead ignorance of the law, although the fact of such ignorance, if established, would doubtless be taken into account in awarding punishment.

These two leading principles, the presumption of the knowledge of the law, and the fixing on every man the responsibility of what necessarily results from his actions, run through the whole system of English as well as Foreign, modern as well as ancient law. They are inseparably entwined, and must never be broken in upon. "There are," said a great judge, "two maxims which must never be weakened. One is that you must ascribe to every subject a knowledge of the law, especially when it prescribes a rule of civil conduct. The other maxim is that you must impute to every man a knowledge of that which is a necessary and inevitable result of an act deliberately done by him."<sup>3</sup>

<sup>1</sup> Taylor, Ev. Vol. i. p. 96; Bennet and Case, 1 Bl. and Ell. p. 1.

<sup>2</sup> Bilbie v. Lumley, 2 East, p. 469.

<sup>3</sup> Per Lord Westbury in Carter v. M'Laren, 3 House of Lords Cas., Scotch Appeals, p. 126.

V. It remains in concluding this note to make brief reference to some general matters which are judicially noticed without further proof.

1. Every sovereign recognises, and all public tribunals notice the corporate existence and external relations of other sovereign States in the civilized world; for in the community of societies States are to each other as individuals.<sup>1</sup>

2. The judges recognise without proof the Common and Statute Law, the Law of Nations, the Customs of Parliament, the Prerogatives of the Crown and Royal Proclamations; but they will not take cognizance of the internal laws, usages, and customs of foreign States, or even of the Colonies, which must be given in evidence and proved as facts, under 28 & 29 Vic. c. 63. A Military Court would, on the other hand, recognise the laws and customs of the Army, the Regulations and Warrants made by the Sovereign for the government of the Army, and the general or garrison orders of the General Officer in command.

3. The judges also notice judicially the London, Edinburgh, and Dublin Gazettes, on their mere production. They take cognizance also of various official seals, as those of the great Officers of State, of Courts of Justice, of Public Departments, and of the Corporation of the City of London. The seal of a notary public would also perhaps be judicially noticed, as being that of an officer recognised by the civilized world.<sup>2</sup> The Statute known as the Documentary Evidence Act, 1845, admits in evidence without formal proof a numerous class of official documents.<sup>3</sup>

4. It is unnecessary to prove facts which may certainly be known from the invariable order of nature; nor is it necessary to prove the course of time, nor of the heavenly bodies, nor the legal weights and measures, nor the value of the coin of the realm, nor generally any matter of public history affecting the whole people.

5. Courts also notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government, the local divisions and districts of the country, the political constitution of their own government, and the persons who share in its regular administration. They will recognise also the accession and demise of the Sovereign, the heads of departments, and the principal officers of State. In like manner a Court-martial would notice without proof the military districts and organization of the Army, and the officers in authority therein.

<sup>1</sup> Taylor on Ev., Ch. 2, Vol. ii. p. 3; Phillimore, Inter. Law, Vol. i. p. 3.

<sup>2</sup> See Earle's Trusts, 4 K. and J. Rep. p. 300.

<sup>3</sup> 8 & 9 Vic. c. 113; and see 14 & 15 Vic. c. 99.



6. And lastly, all tribunals are bound to notice judicially their own rules and canon of proceeding; also the customs and practice of the Courts of Common Law at Westminster, and the limits of their jurisdiction.<sup>1</sup>

## APPENDIX J.—CHAP. XI. PAR. 2.

### UPON THE LEGAL RESPONSIBILITY OF THE CIVIL AND MILITARY AUTHORITIES EMPLOYING TROOPS IN THE SUPPRESSION OF RIOTS.

1. A brief outline of the law relating to the employment of troops in the suppression of riots (rather than of rebellion), may be useful for the guidance of Officers acting in aid of the civil power.

2. I would first observe that under the Common and Statute Law of the Realm (a) The civil authorities—by which I mean (1) the Sheriff, and (2) the Justices of the Peace and their subordinate officers (constables and police)—are primarily charged with the maintenance or preservation of the public peace, and in subordination to their authority, and in support of it; (b) all subjects of the Crown are bound to aid in the suppression of riot, either if called upon so to do, or if accidentally present when no civil authority happens to be at the riot.

3. I would then remark that for the last 200 years it has been the policy and practice of the military authorities to prevent the Army, as individual citizens, from taking any part in any civil *émeute*, by ordering the soldiers to withdraw from the public streets into their barracks or quarters, whenever the assembly of a large number of persons has been anticipated. These orders have frequently emanated from the War Office, but they would be lawful orders for any Commanding Officer to issue upon his own responsibility, if he deemed the necessities of the case to demand them.<sup>2</sup>

4. Now the statement which is sometimes made that the law upon the subject under consideration is the same, whether applied to the Army or to the citizen, must be accepted with these qualifications: 1st. That all officers and soldiers go to the suppression of a riot (a) in obedience to military orders from the Crown; and (b) with deadly weapons more likely to kill than to capture rioters. 2nd. That being there as soldiers governed

<sup>1</sup> See Taylor on Ev., Vol. i. c. 2, pp. 3-31.

<sup>2</sup> Chap. VII. par. 19.

by the Mutiny Act, they are bound to obey<sup>1</sup> the command of their superior officer. Therefore the conduct of a soldier in the suppression of riot, differs essentially from that of a peace officer, and needs a special justification.

5. It is to be noticed that the Riot Act, though declaring persons riotously assembled to be "felons"<sup>2</sup> if they do not disperse within one hour after the Act has been read, does not authorize more than their seizure and apprehension for trial and punishment according to law. If they happen to be killed by reason of their resisting the persons who may be dispersing, seizing, or apprehending them, then the Justice and all persons so aiding and assisting him are indemnified. The Act affords no justification in taking life, unless such is to be found in the necessity for dispersing the mob, or in the accident of apprehending any rioter.

6. From decided cases, and the opinions of Law Officers who were ultimately raised to the Great Seal,<sup>3</sup> there will be little difficulty in showing the nature and extent of the individual responsibility at the suppression of riots which rests upon, viz.—

- I. The Civil Magistrate,
- II. The Military Officer in Command,
- III. The Subordinate Officer or Private Soldier acting under Command.

I. As to the Civil Magistrate.

7. If the aid of armed men be needed by the Magistrate, his requisition should be sent to the Commanding Officer, requesting him to march the soldiers to the place stated in the requisition. In case of future controversy, this requisition should be evidenced by a note in writing signed by the Justice. If the Magistrate fail to call in the military, or, having their attendance, to order them to act in his aid, the responsibility (if any) will rest upon him, and not upon the military officer or soldiers.

8. This appears to have been accepted as the law in 1780, when (after the Gordon Riots) the Lord Mayor (Kennett) was convicted of criminal neglect of duty. While rioting and the destruction of property went on, the troops were kept waiting in barracks by the Secretary at War for the requisition of the Civil Magistrates, and when called out by their authority no order

<sup>1</sup> Chap. II. par. 27; Chap. V. par. 9.

<sup>2</sup> Vol. II. p. 129. This and other references are to 'The Military Forces of the Crown.'

<sup>3</sup> Most of these are set out in extenso in Vol. II. Chap. xvii. and appendices.

was given to the officer to act.<sup>1</sup> The troops, therefore, returned to their quarters after the Magistrates had left the scene of riot, without taking any part in quelling the continuing disorder. Subsequently, at the instance of the King, the Cabinet ordered the troops "to act without waiting for directions from the Civil Magistrates, and to use force for dispersing the illegal and tumultuous assemblies."<sup>2</sup>

9. It is clear, therefore, that the Secretary at War deemed it beyond his authority upon that occasion to sanction the action of the military without the personal presence and direction of the Civil Magistrate; and a few years later (in 1796) Lord Eldon advised the Crown "that the presence of the Magistrate with the military was indispensably necessary."<sup>3</sup> Being present, it follows that the Commanding Officer should look to the Magistrate for directions; for "though the former *may* act" (as Mr. Justice Littledale<sup>4</sup> laid down to the Jury after the Bristol Riots in 1822) "without any Magistrate, no prudent man would do so, because his acting may be attended with the loss of life." And "undoubtedly," said Chief Justice Tindal, "the same exercise of discretion which requires the private subject to act in subordination to and in aid of the Magistrate rather than on his own responsibility, before recourse is had to arms, ought to operate in a still stronger degree with a military force."<sup>5</sup> If the Magistrate signs an order giving the Military Officer directions to act, that will be deemed sufficient authority without his personal presence with the soldiers, over whom he can exercise no authority or command.

## II. The Military Officer in Command.<sup>6</sup>

10. It is clear that he may receive the specific orders or general authority of the Magistrate; specific orders to fire then and there upon the rioters, or general authority to take such measures as he may deem necessary to disperse them. In any alternative the orders of the Magistrate do not afford the Officer in command of troops an entire immunity from criminal consequences, should he be arraigned for murder, if death resulted from his orders. "Soldiers," wrote the late Lord Lyndhurst,<sup>7</sup> in 1824,

<sup>1</sup> Letters printed at pp. 635-7.

<sup>2</sup> Council order printed at pp. 659-60.

<sup>3</sup> Vol. II. p. 639.

<sup>4</sup> Justice Littledale in *Pinney's Case*, 5 Car. and Pay. p. 278.

<sup>5</sup> *Ib.* note at p. 263.

<sup>6</sup> Where a Naval Officer violated the Laws of Neutrality and destroyed life the offence was murder, for which he was liable to be tried by a naval Court-martial. Vol. ii. Adm. Op. (22 Sept. 1806, p. 186).

<sup>7</sup> *Forsyth's Cases*, p. 196.

“when called upon and required to aid the Civil Magistrate in apprehending or opposing persons engaged in a riot, will be justified in using the force necessary for that purpose. Any excess will be illegal, and for such excess the soldier, as well as the mere citizen, will be responsible. In this respect the law, as applicable to both classes, is the same. If in executing the commands of the Magistrate, opposition is made by the rioters, force may be opposed to force; but the same rule still applies, viz., that the extent of the force used must be regulated by the necessity of the occasion. The excess only is illegal. If the military, in obeying the lawful commands of the Magistrate, be so assailed that resistance cannot be effectually made without sacrificing the lives of the rioters, they would in law be justified in so doing. It is obvious, therefore, that each case must depend on its own circumstances; and the only rule that can be given is that the force, to be legal and justifiable, must in every instance, as far as the passion of human infirmity will admit, be governed by what the necessity of the particular occasion may require.”

11. In the Bristol Riots, the two officers in command of cavalry and infantry dissuaded the Magistrate from giving orders to fire; and it is certain that the Military Officer ought not to be permitted wholly to disclaim responsibility for his acts, as done in obedience to the command of the Civil Magistrate. The Queen's Regulations or Orders for the Army may no doubt lay down that the Officer is to exercise no discretion in the matter, and that whenever ordered by the Magistrate to fire or to destroy property he should do so; but these Orders, if they protect the Officer from, transfer criminal responsibility to those officials by whom the Regulations or Orders were issued.<sup>1</sup>

12. The fact of soldiers going out to aid the Civil Magistrate in obedience to the Queen's Regulations, creates the distinction so essential to be recognized between their case and that of the ordinary citizen. “When,” wrote Lord Eldon,<sup>2</sup> “His Majesty, or His Majesty's officers by his command, authorize any military corps to act in the assistance of the Civil Magistrate, they do not authorize those composing that corps to leave their military duty, but require them, in obedience thereto, to afford assistance to the Magistrate in the exercise of his duty.” And again, “His Majesty may, by orders given to the troops, make assistance to the Civil Magistrate in the legal execution of his civil duty, a part of their military duty: that the troops acting at

<sup>1</sup> See this view upheld by the Law Officer in 1808, Vol. ii. Adm. Op. p. 246.

<sup>2</sup> P. 640.

the requisition of the Magistrate in obedience to such orders, would still be subject to military discipline, and would, therefore, act as a military body commanded by military officers, and that the orders of the Civil Magistrate would not warrant them in disobedience to the orders of their military superiors acting in the discharge of their military duty."<sup>1</sup> It is essential to allow a discretion to the officer in command, for though he should not act without, yet, having the order of the Civil Magistrate, it must be left to his judgment and discretion to carry out a difficult duty in the emergency.<sup>2</sup>

### III. The Subordinate Officer and Private Soldier.

13. Possibly enough has been written to shew that the soldier goes out as such under the Mutiny Act, and not as an *armed citizen*, amenable only to the ordinary Criminal Law; but to keep the distinction in view I must remark—

1st. That the Magistrate having authority over the citizen, has none over the soldier.

2nd. That the soldier's obedience to his Commanding Officer is the legal justification for his use of deadly weapons.

14. It is only "so far as it is consistent with obedience to military discipline and command that the Magistrate has the power to call for the assistance of the military," wrote Lord Eldon,<sup>3</sup> in 1796. Again, "the Magistrate cannot require from the military any assistance repugnant to the obligations of their military duty, such as to march from that part of the country in which they are stationed by their military orders to that part of the country to which their military orders do not direct or authorize them to go;" and again, "the command of a Magistrate cannot exempt soldiers from discipline," for that, as a consequence, "would exempt the officers from all responsibility for the conduct of their soldiers whenever they were called upon to assist the Magistrate."<sup>4</sup> These statements of the law are in strict conformity with more recent decisions.

15. Between the Commanding Officer and those serving under him the obligation to obedience is enforced by the Mutiny Act and Articles of War. "How far," said the late Justice Willes,<sup>5</sup> "the orders of a Superior Officer are a justification to his inferior who acts on them I do not undertake to decide. With regard to Englishmen in England, questions have been raised. I believe

<sup>1</sup> P. 648.

<sup>2</sup> *Tobin v. the Queen*, 16 C. B. (N.S.) p. 352.

<sup>3</sup> Lord Eldon, p. 638.

<sup>4</sup> P. 646.

<sup>5</sup> *Keighley v. Bell*, 4 Fos. and Fin. p. 763.

the better opinion to be that an officer or soldier acting upon the orders of his superior, not being plainly illegal, is justified, but if they be plainly illegal, he is not justified."

16. The presence of soldiers at the riot with deadly weapons needs no other justification from them. "The orders of the General," said Mr. Justice Perrin,<sup>1</sup> in the Six-Mile Bridge case, "they are bound to obey, and not permitted to canvass." To the question, What justifies their use of deadly weapons? the same learned Judge answered, "That which in other persons might denote a previous evil or deadly intention, plainly suggested none in them, for they must obey their orders as soldiers;"<sup>2</sup> and he then went on to explain to the Grand Jury that unless soldiers acted in obedience to the orders of their officers, they lost all legal protection as soldiers, and were bound to justify their individual acts according to the law applicable to ordinary citizens. "Being soldiers this, instead of giving them licence, obliges them to obey their officers in the use of arms:<sup>3</sup> having failed to do so and fired without command they were prosecuted for homicide, and their conduct could be justified only under the law applicable to ordinary persons. They had no right to repel a trespass on themselves, or on the escort, by firing or inflicting mortal wounds."

17. With regard to the Auxiliary Forces of the Crown, the General Officers commanding districts will exercise command and authority over them when called or coming out voluntarily to aid the civil power. Hitherto the Lord-Lieutenant of each County has been held to be the responsible officer for the preservation of the peace thereof, but as this authority has been transferred to the Crown, the Queen's Regulations must give directions as to—

1. The Army Reserve,<sup>4</sup> which may be called out as to the force by the Secretary of State, or as to part thereof by the Commanding Officer of the town or district. (30 & 31 Vic. c. 110, s. 9.)
2. The Permanent Staff of the Militia, who may be brought out by order of the Secretary of State.
3. The Yeomanry, who, at the invitation of the Secretary of State, may come out under section 23 of the 44 Geo. III. c. 54, as Voluntary Service.

<sup>1</sup> Vol. II. p. 146.

<sup>2</sup> Vol. II. p. 147.

<sup>3</sup> P. 146.

<sup>4</sup> Vol. I. pp. 338-42; Vol. II. p. 139.

## APPENDIX K.—CHAP. XI. PAR. 7.

AS TO THE POWER OF INFLICTING CAPITAL PUNISHMENT UPON PRISONERS OF WAR BREAKING THEIR PAROLE.<sup>1</sup>

A French prisoner of war having had leave to return to France upon his declaring that he would "not serve against Great Britain, nor any of the Powers in alliance with that kingdom, until a British prisoner of war of equal rank detained in France was liberated and permitted to return to England in exchange for him, and upon his also engaging that should he not be able to effect such exchange before the expiration of a reasonable time from that date, he should immediately thereafter return to England and surrender himself a prisoner of war." The King's Advocate, Attorney- and Solicitor-General, and the Advocate and Counsel for the Admiralty were consulted: "Whether, in point of law, immediate Military execution would be justifiable on the Declarant (his person being identified to the satisfaction of the Commanding Officer or person taking him prisoner) in case he should again be found in arms against His Majesty or any of his Allies, or whether it is necessary that any and what form of proceeding should take place to authorize such execution." Whereupon their opinion was written in these words: "Assuming that by the Law of Nations immediate Military execution would be justifiable upon a person who after having been liberated upon parole was found in arms against the Power which had released him, yet it is obvious that in this case more would be requisite than the mere ascertainment of his identity before the person in question could be justifiably executed. By the condition of his parole he is authorized to serve against Great Britain or her Allies upon the event of any British prisoner of war of equal rank who was at that time in France being liberated or permitted to return to England in exchange for him, and therefore before his execution could on any principle be justified, it would be necessary to give him the opportunity of being heard as to the fact whether any such British prisoner had been so liberated or permitted to return to England, or whether such orders had been given, or such things had passed that he had fair ground to presume that the condition of his parole had been fulfilled. We therefore are clearly of opinion that immediate Military execution would

<sup>1</sup> Taken from Vol. ii. Adm. Op., pp. 86-8.

not be justifiable upon the person on the mere proof of his identity, and that the other fact necessary to be ascertained would require a more extensive inquiry than could under such circumstances be instituted. We have been unable to discover any trace of the form of proceeding in the nature of a trial for the purpose of ascertaining the facts on which the forfeiture of this man's life must depend, which at any interval from his capture could be instituted, to justify the execution within this country at a time when the authority of the Civil Magistrate is not superseded by Martial Law, and we cannot therefore point out the form of any such proceeding.

"Upon the general question we feel it necessary to give our opinion with great caution. We are aware, indeed, that the execution of a person taken in arms after having been liberated on his parole has been countenanced by the practice and justified afterwards by the authority of persons whose opinion and authority carry with them the greatest weight. But we apprehend those have been cases of Military execution *flagrante bello*, and at the moment when the exigency of circumstances may have compelled extraordinary proceedings. But we are called upon to give advice beforehand with respect to orders directing such execution to be issued deliberately by the Government of the country. To warrant us in giving such advice, we conceive we ought to be able to refer either to some clear authority in the text writers upon the Law of Nations, or to some more uniform practice in the conduct of nations which would fully justify the proceeding; and we have not been able to find either. On the contrary, it seems to us that the latest writers of authority on this subject have gone no further than to state the importance of the rigid observance of such engagements, and the high obligation imposed on the country of the released prisoner to compel its observance; and we are induced to conclude that those writers could find no uniform practice or clear authority on the subject, and that they rather considered the performance of the parole as a matter of good faith to be observed in the conduct of war, and which the country who had released the prisoner had a right to demand as such from the Government of the enemy.

"JOHN NICHOL,  
"JOHN MITFORD,  
"W. GRANT,  
"WM. BATTINE,  
"SP. PERCEVAL."

"*Lincoln's Inn, January 24th, 1801.*"



## APPENDIX L.—CHAP. XII. PAR. 25.

### REGIMENTAL DEBTS ACT,<sup>1</sup> 1863, AND REGULATIONS THEREUNDER.

[*Extracts.*]

SECTION	PAGE
<b>PART I.—COLLECTION AND DISPOSAL OF EFFECTS.</b>	
7. On death of officer or soldier on service, committee of officers to secure effects .. .. .	369
REGULATIONS BY ROYAL WARRANT OF 30TH SEPTEMBER, 1864.	
[Pars. 2 to 4.]	
8. If preferential charges not paid, power to committee to sell and convert effects, and to get in credits, and, after payment of expenses, to secure surplus .. .. .	369
[Regulations, Pars. 5 to 10.]	
9. In India, power for committee to deliver over effects to administrator-general .. .. .	371
[Regulations, Pars. 11 to 13.]	
10. Remittance of surplus by committee .. .. .	372
[Regulations, Pars. 14 to 24.]	
<b>MEDALS AND DECORATIONS.</b>	
19. Medals and decorations excepted; to be disposed of according to Royal Warrant .. .. .	374
<b>EXCEPTION AS TO REGIMENTAL PAYMASTERS.</b>	
20. Special provision for case of death of regimental paymaster .. .. .	374
[Regulations, Par. 30.]	
<b>PART II.—DESSERTION AND OTHER CASES.</b>	
27. On desertion, committee of officers to sell effects, and pay expenses ..	375
28. Application of surplus .. .. .	375
29. Absence without leave .. .. .	375
30. Act to apply to apprentices and felons .. .. .	375
[Regulations, Pars. 31, 32.]	
<b>PART III.—INSANITY.</b>	
31. In case of insanity, committee of officers to secure effects .. ..	376
32. Liability of effects to be applied as for payment of preferential charges .. .. .	376

<sup>1</sup> The Act (26 & 27 Vic. c. 57) is referred by Sec., and the Regulations by Par. The extracts relate only to the duties of a Committee of Adjustment at the Regiment or Station.

SECTION	PAGE
33. If preferential charges not paid, power for committee to sell and apply proceeds .. .. .	377
[Regulations, Para. 33, 34.]	

*PART I.—Collection and Disposal of Effects.*

SEC. VII. Immediately on the death of an officer or soldier on service, such committee of officers as may be prescribed by royal warrant, according to the circumstances of different cases, hereinafter called the committee of adjustment, shall secure all such of his effects as—

Where the death occurs in the United Kingdom, are in camp or quarters; and

Where the death occurs out of the United Kingdom, are within the station, colony, or command.

*Regulations by Royal Warrant of 30th Sept. 1864.*

Par. 2. Where the deceased was an officer employed on the staff, the committee of adjustment is to consist of two officers to be appointed by the officer commanding on the station, one of whom is to be, if practicable, a field officer.

Par. 3. Where the deceased was an officer not employed on the staff, the committee of adjustment is to consist of the major of the regiment or the officer doing the major's duty in his absence, and two other officers of the regiment not under the rank of captain (unless officers of that rank or of the regiment cannot conveniently be had), to be appointed by the commanding officer of the regiment or by the officer commanding on the station.

Par. 4. Where the deceased was a soldier, the committee of adjustment is to consist of the officer commanding the troop or company to which the deceased belonged, and two other officers of the regiment to be appointed by the commanding officer.

SEC. VIII. Provided, that if the representative of the deceased, his widow (if any), or any of his next of kin, pays in full the preferential charges,<sup>1</sup> the committee of adjustment shall not further interfere in relation to the property.

<sup>1</sup> These are payable in the following order:—

(1.) Expenses of last illness and funeral:

(2.) Military debts, namely, sums due in respect of—

If such payment is not made, then, within one month after the death, the committee of adjustment may and shall, without any representation taken out, and as if they were the representatives of the deceased, and to the exclusion of all other authorities and persons whomsoever, sell or convert into money such parts of the effects of the deceased as do not consist of money,—and also where the death occurs out of the United Kingdom get in and give receipts (which shall be effectual discharges) for all or any of the credits forming part of the estate of the deceased, and being payable or recoverable in India or in the colony or possession in which the deceased was quartered (as the case may be), and, if they think fit sue for and recover any of such credits,—and, after paying thereout the expenses attending the discharge of their duties, shall pay thereout the preferential charges, and secure the surplus of the effects, or effects and credits, as the case may be, remaining over after all such payments.

Par. 5. The committee of adjustment are in all cases, as soon as practicable after the death, to make an inventory of the property, and an account of the debts and credits, of the deceased.

Par. 6. The inventory and account are to be made in duplicate, on the forms supplied, and each of the duplicates is to be certified by the committee of adjustment.

One of the duplicates is to be dealt with as hereafter in these regulations directed.

Where the death occurs in India, the second of the duplicates is to be sent to the military secretary to the government of the presidency in which the deceased was quartered, and is to be delivered by him to the administrator general for the presidency, in cases where § (3) of section 12 of the Act applies, and is to accompany the remittance of the surplus in cases where § (5) of the same section applies.

(a) Quarters; (b) Mess, band, and other regimental accounts; (c) Military clothing, appointments and equipments, not exceeding a sum equal to six months' pay of the deceased, and having become due within eighteen months before his death; including sums due to any agent or to any paymaster, quartermaster, or other officer, on any such account, or on account of any advance made for any such purpose; to which shall be added, where the death occurs out of the United Kingdom,—

(3.) Servants' wages, not exceeding two months' wages to each servant:

(4.) Household expenses incurred within a month before the death, or after the last issue of pay to the deceased, whichever is the shorter period.

Any doubts arising under this Sect. are to be referred to the decision of the Secretary of State under Sect. 6 of the Act.

Where the death occurs elsewhere than in India, the second of the duplicates is to be kept with the regimental or other proper records.

Par. 7. The effects secured are to be kept in a place of security until duly sold or otherwise disposed of.

Par. 8. The effects secured are to be disposed of at fair and open auction at the most favourable opportunity, in the case of an officer in the presence of a member of the committee of adjustment, and in the case of a soldier, in the presence of the officer commanding the troop or company.

Par. 9. The practice of employing a non-commissioned officer in selling by auction such of the effects of a deceased officer or soldier as are not otherwise disposed of is to be adhered to only in cases in which it appears to be most advantageous for the estate of the deceased.

When much trouble and responsibility are thrown upon the man by his being so employed, a commission, payable out of the effects, at a rate varying from two to five per cent. on the amount of the produce of the sale, according to the greater or less degree of trouble and responsibility thereby caused, may be paid to him, and charged in the statement of the accounts of the deceased, the man's receipt for the amount being annexed thereto, together with the certificate of the commanding officer that his employment as auctioneer was most advantageous for the estate, and that the duties performed by him justify the remuneration charged.

Par. 10. Where the committee of adjustment withdraw from interference in relation to the property of the deceased in consequence of the representative of the deceased, or his widow, or some of his next of kin, paying in full the preferential charges, the committee are forthwith to forward, together with the inventory and account, a report of the facts and circumstances as follows :

Where the death occurs elsewhere than in India, or the death occurs in India, the deceased being (in the latter case) a soldier of Her Majesty's army,—to the Secretary of State for War :

Where the death occurs in India, the deceased not being a soldier of Her Majesty's army,—to the military secretary to the government of the presidency in which the deceased was quartered.

Sec. IX. Where the death occurs in India, the committee of adjust-

ment may, in such cases, under such circumstances, and at such time or times, as may be prescribed by royal warrant, according to the circumstances of different cases, deliver over the effects secured by them to the administrator general for the presidency in which the deceased was quartered.

Par. 11. The committee of adjustment (in India) are to deliver over the effects secured by them to the administrator general only in case they apprehend that considerable difficulty or delay may arise in or about the collection or realization of the effects and credits of the deceased, in consequence of the character of any investment, or in consequence of it being requisite to institute some action or suit in relation to the property of the deceased, or in case there is some other peculiar circumstance connected with the property making it, in the judgment of the committee, expedient to take that course.

Par. 12. Where the Committee of adjustment deliver over effects to an administrator general, they are to do so as soon as practicable after they have determined to take that course.

Par. 13. Where the committee of adjustment deliver over effects to an administrator general, they are forthwith to forward, together with the inventory and account, a report of the facts and circumstances, as follows:—

Where the deceased was a soldier of Her Majesty's army,—to the Secretary of State for War:

In other cases,—to the military secretary to the government of the presidency in which the deceased was quartered.

#### *Disposal of Surplus.*

SEC. X. The committee of adjustment shall, according to the circumstances of the case, remit or lodge the surplus aforesaid to or in the hands of such paymaster or other officer or person, at such time or times, in such manner, and together with such accounts, vouchers, reports, and information, as may be prescribed by royal warrant.

Par. 14. Where the deceased was an officer employed on the staff, and the death occurs elsewhere than in India, the committee of adjustment are to remit or lodge the surplus, as follows:—

Where the death occurs in the United Kingdom, they are to remit the surplus to the general agent for the recruiting service in London:

Where the death occurs at any station abroad (except in India),

they are to lodge the surplus in the commissariat chest, taking a receipt for the amount from the officer in charge of the commissariat chest, which receipt, together with the inventory and the account of debts and credits, they are to transmit to the Secretary of State for War, making at the same time a full report of their proceedings to the officer commanding on the station.

Par. 15. Where the deceased was an officer not employed on the staff, and the death occurs elsewhere than in India, the committee of adjustment are to lodge the surplus in the hands of the regimental paymaster, who is to credit the amount in the next regimental pay list.

Par. 16. Where the deceased was a soldier of Her Majesty's army, then, whether the death occurs in India or elsewhere, the committee of adjustment are to lodge the surplus in the hands of the regimental paymaster, who is to credit the amount in the next regimental pay list or casualty return.

Par. 17. Where the death occurs in India, the deceased not being a soldier of Her Majesty's army, the committee of adjustment are to remit the surplus to the military secretary to the government of the presidency in which the deceased was quartered.

Par. 18. Whenever a committee of adjustment remit or lodge a surplus they are to send or lodge therewith one of the duplicates of the inventory and of the account.

Par. 19. In the case of a soldier of Her Majesty's army, the officer present at the sale is to furnish the paymaster with a certified statement of the particulars thereof, on the printed forms supplied, and is to cause the amount of the produce to be carried to the credit of the man's account in the ledger.

In other cases, where the death occurs in India, the officer present at the sale is to furnish the military secretary to the government of the presidency in which the deceased was quartered with a certified statement of the particulars of the sale.

Par. 24. Where a deceased officer or soldier leaves a will, then, if representation is not taken out, the original will, and, if representation is taken out, a complete and authenticated copy of the will, is to be sent along with the inventory account and other papers by the committee of adjustment,

they are to lodge the surplus in the commissariat chest, taking a receipt for the amount from the officer in charge of the commissariat chest, which receipt, together with the inventory and the account of debts and credits, they are to transmit to the Secretary of State for War, making at the same time a full report of their proceedings to the officer commanding on the station.

15. Where the deceased was an officer not employed on the staff, and the death occurs elsewhere than in India, the committee of adjustment are to lodge the surplus in the hands of the regimental paymaster, who is to credit the amount to the next regimental pay list.

Where the deceased was a soldier of Her Majesty's army, then, whether the death occurs in India or elsewhere, the committee of adjustment are to lodge the surplus in the hands of the regimental paymaster, who is to credit the amount in the next pay list or casualty list.

Where the death occurs elsewhere than in India, and the deceased was a soldier of Her Majesty's army, the committee of adjustment are to refer the matter to the military secretary to the government in which the deceased was quartered.

The committee of adjustment remit or lodge the surplus in the hands of the paymaster or lodge therewith one of the officers of the regiment, and of the account.

Where the deceased was a soldier of Her Majesty's army, the committee of adjustment are to furnish the paymaster with a statement of the particulars thereof, on the printed form, and is to cause the amount of the produce of the sale to be credited to the man's account in the hands of the paymaster.

Where the death occurs in India, the officer present at the sale is to furnish the military secretary to the government in which the deceased was quartered with a statement of the particulars of the sale.

The committee of adjustment will, then, if the inventory is not authenticated by the committee of adjustment,

ment may, in such cases, under such circumstances, and at such time or times, as may be prescribed by royal warrant, according to the circumstances of different cases, deliver over the effects secured by them to the administrator general for the presidency in which the deceased was quartered.

Par. 11. The committee of adjustment (in India) are to deliver over the effects secured by them to the administrator general only in case they apprehend that considerable difficulty or delay may arise in or about the collection or realization of the effects and credits of the deceased, in consequence of the character of any investment, or in consequence of it being requisite to institute some action or suit in relation to the property of the deceased, or in case there is some other peculiar circumstance connected with the property making it, in the judgment of the committee, expedient to take that course.

Par. 12. Where the Committee of adjustment deliver over effects to an administrator general, they are to do so as soon as practicable after they have determined to take that course.

Par. 13. Where the committee of adjustment deliver over effects to an administrator general, they are forthwith to forward, together with the inventory and account, a report of the facts and circumstances, as follows :—

Where the deceased was a soldier of Her Majesty's army,—to the Secretary of State for War :

In other cases,—to the military secretary to the government of the presidency in which the deceased was quartered.

#### *Disposal of Surplus.*

Sec. X. The committee of adjustment shall, according to the circumstances of the case, remit or lodge the surplus aforesaid to or in the hands of such paymaster or other officer or person, at such time or times, in such manner, and together with such accounts, vouchers, reports, and information, as may be prescribed by royal warrant.

Par. 14. Where the deceased was an officer employed on the staff, and the death occurs elsewhere than in India, the committee of adjustment are to remit or lodge the surplus, as follows :—

Where the death occurs in the United Kingdom, they are to remit the surplus to the general agent for the recruiting service in London :

Where the death occurs at any station abroad (except in India),



they are to lodge the surplus in the commissariat chest, taking a receipt for the amount from the officer in charge of the commissariat chest, which receipt, together with the inventory and the account of debts and credits, they are to transmit to the Secretary of State for War, making at the same time a full report of their proceedings to the officer commanding on the station.

Par. 15. Where the deceased was an officer not employed on the staff, and the death occurs elsewhere than in India, the committee of adjustment are to lodge the surplus in the hands of the regimental paymaster, who is to credit the amount in the next regimental pay list.

Par. 16. Where the deceased was a soldier of Her Majesty's army, then, whether the death occurs in India or elsewhere, the committee of adjustment are to lodge the surplus in the hands of the regimental paymaster, who is to credit the amount in the next regimental pay list or casualty return.

Par. 17. Where the death occurs in India, the deceased not being a soldier of Her Majesty's army, the committee of adjustment are to remit the surplus to the military secretary to the government of the presidency in which the deceased was quartered.

Par. 18. Whenever a committee of adjustment remit or lodge a surplus they are to send or lodge therewith one of the duplicates of the inventory and of the account.

Par. 19. In the case of a soldier of Her Majesty's army, the officer present at the sale is to furnish the paymaster with a certified statement of the particulars thereof, on the printed forms supplied, and is to cause the amount of the produce to be carried to the credit of the man's account in the ledger.

In other cases, where the death occurs in India, the officer present at the sale is to furnish the military secretary to the government of the presidency in which the deceased was quartered with a certified statement of the particulars of the sale.

Par. 24. Where a deceased officer or soldier leaves a will, then, if representation is not taken out, the original will, and, if representation is taken out, a complete and authenticated copy of the will, is to be sent along with the inventory account and other papers by the committee of adjustment,

and is to be transmitted to the Secretary of State for War or the Secretary of State for India in Council, as the case may require.

Where the original will is sent, a complete and authenticated copy of it is to be first made under the direction of the committee of adjustment, and is to be kept with the regimental or other proper records.

#### *Medals and Decorations.<sup>1</sup>*

SEC. XIX. Medals and decorations belonging to an officer soldier dying on service shall not be considered to be comprised in the personal estate of the deceased with reference to the claims of creditors or for any of the purposes of administration under this Act or otherwise; and, notwithstanding anything in this or any other Act contained, the same, when secured by the committee of adjustment, shall be held and disposed of according to regulations laid down by royal warrant.<sup>2</sup>

#### *Exception as to Regimental Paymasters.*

SEC. XX. The case of a regimental paymaster dying on service shall, notwithstanding anything hereinbefore contained, be provided for as follows :—

- (1) That case shall be deemed wholly excepted out of the foregoing provisions of this Act, save so far as they define and give preference to and regulate the payment of and provide for decisions respecting preferential charges, and as they relate to the duties and powers of the committee of adjustment, and to medals and decorations :
- (2) The duties and powers of the committee of adjustment in relation to the property shall nevertheless, in the case of a regimental paymaster, be deemed to arise in full, immediately and unconditionally, on the death, and to continue notwithstanding the payment of the preferential claims by any person :
- (3) Money in the possession or under the control of a regimental paymaster at his death shall not be considered to be comprised in his effects for the purposes of this Act :
- (4) The surplus in the hands of the committee of adjustment shall, in the case of a regimental paymaster, be deemed

<sup>1</sup> As to medals, &c., see Vol. II. p. 326.

<sup>2</sup> No regulations have been issued, but the Royal Warrant of September 1863 orders their disposal by the Secretary of State, as, according to different circumstances, he shall see fit.

by them as may be prescribed by royal warrant, and not according to the foregoing provisions of this Act.

**Par. 30.** In the case of a regimental paymaster, the committee of adjustment is to consist of the commanding officer, the quartermaster, and the senior captain (present at head quarters) of the regiment.

The committee of adjustment are to forthwith remit the surplus to the Secretary of State for War.

#### **PART II.—Desertion and other Cases.**

**Sec. XXVII.** In every case of desertion, such committee of officers as may be prescribed by royal warrant, according to the circumstances of different cases, herein-after called the committee of adjustment, shall immediately secure all such of the deserter's effects as—

Where the desertion occurs in the United Kingdom, are in camp or quarters; and

Where the desertion occurs out of the United Kingdom, are within the station, colony, or command;

and shall forthwith make an inventory thereof, and shall, within three months after the desertion, sell or convert into money such parts of the deserter's effects as do not consist of money, and thereout pay the expenses attending the execution of the provisions of the present section.

**Sec. XXVIII.** The surplus remaining after such payment shall be liable to be applied in or towards payment of any such expenses and debts incurred and owing by the deserter as would, under Part I. of this Act, be preferential charges on his personal property in case he had died on service, with the like preference, in the like order, and subject to the like provision for decision of doubt or difference, as would in that case apply, as nearly as may be, *mutatis mutandis*.

The committee of adjustment shall apply the same accordingly, and then shall dispose of any property remaining in their hands according to regulations laid down by royal warrant.

**Sec. XXIX.** For the purposes of this part of this Act, absence without leave for twenty-one days shall be deemed included in the term, desertion.

**Sec. XXX.** The provisions of this part of this Act shall apply, as nearly as may be, *mutatis mutandis*, in the case of a soldier delivered up as an apprentice, or convicted of felony.

Par. 31. In all cases of desertion, and of a soldier being delivered up as an apprentice, or convicted of felony, by the civil power, the committee of adjustment is to be composed in like manner as in the respective cases of death.

Par. 32. The foregoing regulations relative to the respective cases of death are to be applied in cases of desertion, apprenticeship, and felony, as far as the difference of the circumstances will admit; but the committee of adjustment are forthwith to remit or lodge the money remaining in their hands to or in the hands of the regimental paymaster, military secretary, or other officer or person to whom or in whose hands they are to remit or lodge the surplus in the respective cases of death; and he is forthwith to transmit the same to the Secretary of State for War or the Secretary of State for India in Council, as the case may require.

The same is to be then with all convenient speed applied as follows :—

In case of desertion, in the manner in which, if the same were an undisposed-of residue, it would for the time being be applicable under section 18 of the Act at the expiration of such period of six months as in that section mentioned :

In other cases, in such manner as the Secretary of State for War or Secretary of State for India in Council (as the case may be) in his discretion thinks fit.

### PART III.—*Insanity.*

SEC. XXXI. Where an officer or soldier is removed, put on half pay, or discharged, on the ground of insanity, such committee of officers as may be prescribed by royal warrant, according to the circumstances of different cases, hereinafter called the committee of adjustment, shall immediately secure all such of his effects as—

Where the insanity occurs during service in the United Kingdom, are in camp or quarters; and

Where the insanity occurs during service out of the United Kingdom, are within the station, colony, or command.

SEC. XXXII. The effects of such an officer or soldier shall be liable to be applied in or towards payment of any such expenses and debts incurred and owing by him as would, under Part I. of this Act, be preferential charges on his personal property in case he had died on service, with the like preference, in the like order, and subject

to the like provision for decision of doubt or difference, as would in that case apply, as nearly as may be, *mutatis mutandis*.

**Sec. XXXIII.** If any person who would, if such officer or soldier were dead, be entitled to take out representation to him (otherwise than as a creditor), or his wife (if any), or any near relative, pays in full the expenses and debts aforesaid, the committee of adjustment shall not further interfere in relation to the property.

If such payment is not made, then, within one month after the removal, putting on half pay, or discharge, is known at the quarters where the effects are, the committee of adjustment may and shall sell or convert into money such parts of the effects as do not consist of money, and, after paying thereout the expenses attending the discharge of their duties, shall pay thereout the expenses and debts aforesaid, and shall dispose of any property then remaining in their hands as may be prescribed by royal warrant, to the end that the same may be applied for the benefit of the officer or soldier to whom it belongs.

**Par. 33.** In cases of insanity, the committee of adjustment is to be composed in like manner as in the respective cases of death.<sup>1</sup>

**Par. 34.** The foregoing regulations relative to the respective cases of death are to be applied in a case of insanity, as far as the difference of the circumstances will admit; but the committee of adjustment are forthwith to remit or lodge the money remaining in their hands to or in the hands of the regimental paymaster, military secretary, or other officer or person to whom or in whose hands they are to remit or lodge the surplus in the respective cases of death; and he is forthwith to transmit the same to the Secretary of State for War or the Secretary of State for India in Council, as the case may require.

The same is to be then, with all convenient speed, applied for the benefit of the officer or soldier to whom it belongs, in such manner as the Secretary of State for War or the Secretary of State for India in Council (as the case may be) in his discretion thinks fit.

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<sup>1</sup> When officers or soldiers become insane in India, the provisions of Act 14 of 11 September, 1873, passed by the Governor-General of India in Council, apply.

## 8 Courts of Inquiry under the Volunteer Act, 1863.

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### APPENDIX M.—CHAP. XI. PAR. 28.

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#### COURTS OF INQUIRY IN THE VOLUNTEER FORCE

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*Extracts from "The Volunteer Act, 1863," and from the Regulations*

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26 & 27th Vic. c. 55.

SECTION

15. Lieutenant of County may assemble a Court of Inquiry, to report to the Lieutenant or the Commanding Officer .. .. .

REGULATIONS OF 18TH SEPTEMBER 1863.

PARS.

74. Nature of .. .. .  
75. Duties of .. .. .  
76. May be re-assembled .. .. .  
77. Power of Officer Commanding an Administrative Regiment to assemble

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SEC. 15. The Lieutenant of the County to which a Volunteer Corps belongs, or within whose Jurisdiction the Head Quarters of an Administrative Regiment are situate, may at any Time assemble a Court of Inquiry to inquire into any Matter relative to the Corps or Regiment, or to any Officer or Volunteer or Non-commissioned Officer of the Permanent Staff belonging thereto, and to report on the Facts and Circumstances ascertained on such Inquiry, required, to report on the same, for the Information and use of the Lieutenant; such Court, where the Inquiry is witnessed by an Officer, to be composed of Officers of the Volunteer Corps belonging to the County, and in other Cases to be composed of Officers and Volunteers belonging to the Corps or Regiment, or of such Officers, or of such Volunteers.

The Commanding Officer of a Volunteer Corps or Administrative Regiment may at any time assemble a Court of Inquiry composed either of Officers and Volunteers belonging to the Corps or of such Officers or of such Volunteers, to inquire into any Matter relative to the Corps or Regiment or to any Volunteer.

4.] *Courts of Inquiry under the Volunteer Act, 1863.* 379

Commissioned Officer of the Permanent Staff belonging thereto, and to record the Facts and Circumstances ascertained on such Inquiry, and, if required, to report on the same, for the Information and Assistance of the Commanding Officer; but nothing herein shall authorize any Inquiry with reference to an Officer otherwise than by a Court assembled by Direction of such Lieutenant of the County as aforesaid, and composed exclusively of Officers of the Volunteer Force belonging to such County.

*Extract from Regulations dated 18th Sept. 1863.*

Par. 74. A Court of Inquiry is not a judicial body; it has no power to administer an oath.

It is to be considered as a Board of which a Lord-Lieutenant or an Officer in Command of a Corps may make use, to assist him in arriving at a correct conclusion on any subject upon which it may be expedient for him to institute an inquiry.

If it is found necessary to cause the conduct of an Officer to be investigated by a Court of Inquiry, the Lord-Lieutenant can alone convene the Court, which in such a case, must be composed of Officers of the Volunteer Establishment within the county over which the Lord-Lieutenant has jurisdiction.

Par. 75. The duties of a Court of Inquiry depend on the instructions which the convening authority may think proper to give.

It may either be employed merely in collecting and arranging evidence, or it may, in addition, be directed to give an opinion as to the facts established by that evidence, but it has no power to pronounce any judgment as to the course to be taken by the convening authority in dealing with those facts.

When facts connected with the conduct of an individual are submitted to the investigation of a Court of Inquiry, it is necessary that the instructions for the guidance of the Court should be sufficiently specific, as regards matter, names, dates, and places, to convey clearly to the Court the nature of the subject into which it is appointed to inquire, and also to enable the person whose conduct is called in question, to know what he has to answer.

It rests with the authority who orders the assembly of a Court of Inquiry to decide whether it shall be open or close.

All evidence taken by a Court of Inquiry is to be recorded as nearly as possible in the words of the witness, and in the order in which it is received.

The proceedings, when closed, are to be signed by the President and Members, after which they are to be forwarded by the President to the convening authority.

Par. 76. A Court of Inquiry may be re-assembled as often as the superior authority may deem necessary, and on every occasion of its meeting it is competent to receive and record new evidence.

Par. 77. The Commanding Officer of an Administrative Regiment is authorised to assemble a Court of Inquiry, to investigate any matter with which he has himself the power of dealing.



# INDEX\*

TO

THE TEXT (COL. 1), THE MUTINY ACT (COL. 2), AND  
THE ARTICLES OF WAR, 1873 (COL. 3).

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
ABROAD, government of army .. .. .	17, 22, 23, 25-7, 30, 84, 99, 100, 103, 104	1	.. ..
Power to issue Articles of War .. .. .	21, 27, 30	1	.. ..
ABSENCE WITHOUT LEAVE,			
(a) From general duty—			
Of officers .. .. .	.. ..	.. ..	2, 175, 176
Of chaplains .. .. .	.. ..	.. ..	33
Of soldiers; summary punishment by commanding officer, if absence does not exceed five days .. .. .	.. ..	.. ..	50, 174
Soldier absent for more than 21 days to be tried for desertion .. .. .	.. ..	.. ..	43, 136
Soldier tried for desertion may be found guilty of absence without leave ..	153	.. ..	43
If soldier be illegally absent for 21 days, court of inquiry to be held .. ..	200	.. ..	167
What absence forfeits service towards good conduct pay and pension .. ..	.. ..	.. ..	170, 171, 172, 173
(b) From special duty—			
From parade, platoon, or division ..	.. ..	.. ..	70
From divine service .. .. .	.. ..	.. ..	31
From regimental school .. .. .	.. ..	.. ..	32
ACCOUNTS, to be made up under Regulation ..	.. ..	.. ..	30
Offence of signing blank forms .. ..	.. ..	.. ..	90
Offence of false entries .. .. .	.. ..	.. ..	87, 88
ACQUITTMENTS, offence of making away with, &c.	100	.. ..	102
ACQUITTAL, prior, by the civil court .. .. .	54, 97, 98, 149	14	.. ..
Honourable .. .. .	151	.. ..	.. ..
ADULTERATION, offences in .. .. .	12	.. ..	52, 53, 56, 58, 59, 62
ADULTERATION AT LAW, for arrest .. .. .	80, 115	.. ..	.. ..
Limitation of, &c. .. .. .	27	89	.. ..
None for administering justice .. ..	75, 135, 189	.. ..	.. ..
By or against brother officers .. ..	79	.. ..	12
ADULTERATION before military court of requests in India	101	99	..

\* I have thought it expedient to preserve the contents of the  
Mutiny Act and Articles of War.

	Pages of Text.	Sections of Mutiny Act.	Number of Articles War.
ADJOURNMENT OF TRIAL .. .. .	136	.. ..	.. ..
ADJUTANT, of fort or garrison .. .. .	50	.. ..	.. ..
Of regiment .. .. .	51, 56, 126	.. ..	.. ..
General of the king .. .. .	51, 108	.. ..	.. ..
General of the governor .. .. .	52, 56, 108	.. ..	.. ..
Disciplinary officer .. .. .	111, 126	.. ..	.. ..
ADVOCATE-GENERAL. (See 'Judge Advocate General.')			
AFFIDAVIT, evidence by .. .. .	{ 88, 89, 115 144, 203 }	.. ..	.. ..
AFFIRMATIONS IN LIEU OF OATHS .. .. .	201, 202	96	153
ALARMS, making false alarms .. .. .	.. ..	.. ..	55
Creating unnecessary .. .. .	77	.. ..	61, 62,
ALIENS, forbidden to command .. .. .	54	.. ..	.. ..
AMENDMENT of charges .. .. .	140	.. ..	.. ..
AMERICAN military code, history of .. .. .	39, 40	.. ..	.. ..
APPEAL NOT GENERALLY ALLOWED .. .. .	17	.. ..	.. ..
Against decision of court of inquiry as to pay or clothing .. .. .	17, 204	.. ..	13
Against summary award of imprisonment or deprivation of pay by commanding officer To common law courts .. .. .	.. .. 78, 81, 157	.. ..	50 12, 13
APPLICATION OF MUTINY ACT AND ARTICLES OF WAR .. .. .	93, 94, 96	2, 3, 4, 5	187, 190
APPREHENSION OF DESERTERS .. .. .	112	34	.. ..
APPROVAL OF COURT-MARTIAL SENTENCE (See 'Confirmation' and 'Revision.')	163	6	{ 123, 124. 127
ARBITRARY PUNISHMENT IN THE ARMY .. .. .	18, 180	.. ..	47, 50
ARMS, offence of casting away .. .. .	.. ..	.. ..	56
Offence of making away with, &c. .. .. .	100	.. ..	102
Care of .. .. .	.. ..	.. ..	11
ARMY ABOARD. (See 'Abroad.')			
On board ships of war .. .. .	105	.. ..	191
Regulation Act, 1871 .. .. .	62	.. ..	.. ..
Organization of Charles II. .. .. .	4, 52	.. ..	.. ..
Standing, sanction of Parliament needed for Of William III. .. .. .	54 55	Preamble	.. ..
Delinquencies of .. .. .	99	.. ..	.. ..
Service Corps, regimental courts-martial in .. .. .	.. ..	.. ..	112
ARRAIGNMENT OF THE ACCUSED .. .. .	139	.. ..	.. ..
ARREST, CIVIL, privilege of witnesses from .. .. .	142	13	.. ..
Privilege of soldiers from. (See 'Exemption.')	97	40, 76	.. ..
ARREST, MILITARY, duration of arrest of officers and soldiers .. .. .	115	.. ..	18
Open or close .. .. .	113	.. ..	.. ..
Crime of breaking arrest .. .. .	113	.. ..	69
Recognised by the civil courts .. .. .	113	.. ..	.. ..
Power of, in cases of fray .. .. .	111	.. ..	15, 40
Power of, in superior authority .. .. .	{ 92, 95, 104, 108, 116 }	.. ..	.. ..
Power of, in two cases limited .. .. .	93, 104, 112	34	.. ..
Court Martial has no power over .. .. .	116	.. ..	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
<b>OF WAR</b>			
Charles I. (1629) .. .. .	9	.. ..	.. ..
Charles I. (1639) .. .. .	10	.. ..	.. ..
Charles II. (1642) .. .. .	10	.. ..	.. ..
Charles II. (1662) (Albemarle's) .. ..	13	.. ..	.. ..
Charles II. (1666) .. .. .	13	.. ..	.. ..
Charles II. (1672) (Rupert's) .. .. .	13	.. ..	.. ..
Charles II. (1685-6) .. .. .	18, 19, 53, 177	.. ..	.. ..
William III. .. .. .	22, 89, 194 note	.. ..	.. ..
.. .. .	22, 23.	.. ..	.. ..
.. .. .	25	.. ..	.. ..
.. .. .	27, 29	.. ..	.. ..
.. .. .	27	.. ..	.. ..
.. .. .	3 (Appendix C, p. 225).	.. ..	.. ..
.. .. .	4, 22, 34, 35, 37	.. ..	.. ..
.. .. .	74	.. ..	.. ..
.. .. .	9, 13, 29, 37, 72, 108	.. ..	.. ..
.. .. .	29	.. ..	.. ..
.. .. .	29	.. ..	.. ..
.. .. .	37	1	.. ..
.. .. .	97	1	189
.. .. .	94	.. ..	.. ..
.. .. .	.. ..	1-7	187, 190
.. .. .	.. ..	.. ..	188
.. .. .	102	97	.. ..
.. .. .	38-9	.. ..	146
.. .. .	.. ..	.. ..	192
.. .. .	34	.. ..	150
.. .. .	98	.. ..	17, 96
.. .. .	.. ..	.. ..	3
.. .. .	136	.. ..	.. ..
.. .. .	52	.. ..	.. ..
.. .. .	30, 57, 74-5, 108	.. ..	.. ..
.. .. .	140-1	.. ..	.. ..
.. .. .	61, 71, 167	5, 105, 106	.. ..
.. .. .	.. ..	.. ..	117, 168
.. .. .	110, 117	.. ..	6
.. .. .	136	.. ..	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
BILL OF RIGHTS .. .. .	54, 177	.. ..	.. ..
BILLETING in Charles II.'s reign .. .. .	52	.. ..	.. ..
In William III.'s reign .. .. .	54	.. ..	.. ..
In 1872 .. .. .	.. ..	4, 30	8, 91, 92, 93
BOARD ( <i>See</i> COURTS) OF INQUIRY, by general officers .. .. .	37, 108, 193	.. ..	.. ..
BOOK, each soldier to have a .. .. .	.. ..	.. ..	29
BOUNTY OF RECRUITS CONCEALING INFIRMITY ..	.. ..	.. ..	3
Stoppages for bounty fraudulently obtained	.. ..	.. ..	130
BRABERY, act of, redemption by .. .. .	12	.. ..	47, 169
BREAD AND WATER PUNISHMENT .. .. .	9	.. ..	.. ..
BREBERY, oath against .. .. .	22, 139	.. ..	.. ..
BREINGERS OF PROVISIONS, violence to, abroad ..	.. ..	.. ..	58
CALLED OUT; when troops are called out in aid of the civil power .. .. .	30, 187	.. ..	.. ..
Provision for temporary imprisonment of offending soldiers .. .. .	.. ..	30	.. ..
CAMP, army in .. .. .	52	.. ..	.. ..
Followers, liability to Mutiny Act .. ..	94	.. ..	6
CANTEENS, regulated by commanding officers ..	.. ..	.. ..	6
CAPITAL PUNISHMENTS. ( <i>See</i> 'Death.')			
CAPTAIN, office of .. .. .	17, 53, 56	.. ..	.. ..
When a captain may be authorized to con- vene district courts-martial .. .. .	.. ..	6	.. ..
Charged with arms, &c., of his troop or company .. .. .	.. ..	10	.. ..
CAPTURED STORES, care of .. .. .	.. ..	.. ..	11
CARRIAGES, supply of .. .. .	.. ..	.. ..	9, 94
CASHIERING, Her Majesty may commute a sen- tence of .. .. .	73, 169	25	.. ..
After trial by civil tribunal .. .. .	98	39	.. ..
Distinguished from dismissal .. .. .	167 note	.. ..	.. ..
CENSURE upon parties to or before a court-martial	172	.. ..	.. ..
By unauthorized persons .. .. .	77	.. ..	.. ..
CERTIFICATES; offence of signing in blank ..	.. ..	.. ..	90
Of conviction or acquittal by civil tribunal	98, 140, 153	39	.. ..
CERTIORARI, writ of .. .. .	158-160	.. ..	.. ..
CHALLENGES by prisoner, trial of .. .. .	127-128	.. ..	152
CHAPLAIN, to a fort or garrison .. .. .	50	.. ..	.. ..
Violence to .. .. .	.. ..	.. ..	31
Absence from duty of .. .. .	.. ..	.. ..	33
Misconduct of .. .. .	.. ..	.. ..	34
CHARACTER, evidence of. ( <i>See</i> 'Previous Con- victions.')	.. ..	.. ..	.. ..
CHARGES AGAINST A PRISONER to be made on commitment .. .. .	113-115	.. ..	73
Not to be vague .. .. .	122, 139	.. ..	140
May be settled by Judge Advocate General	122	.. ..	.. ..
Not framed technically as indictments ..	158	.. ..	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
AINST A PRISONER— <i>continued.</i>			
1 of, by the confirming officer .. ..	165	.. ..	.. ..
f (Appendix G, p. 309).			
Articles of War .. .. .	9-12	.. ..	.. ..
law of .. .. .	4-7	.. ..	.. ..
.. military arrangements .. .. .	12, 49	.. ..	.. ..
.. of War of .. .. .	12-18	.. ..	.. ..
f .. .. .	13, 52	.. ..	.. ..
TREAT in relation to the military .. {	7, 13, 15, 17,	.. ..	96
TER responsible for Mutiny Act ..	25, 27, 29	.. ..	.. ..
.. ..	37	.. ..	.. ..
.. apprehension of soldiers accused of	97, 113	.. ..	17
ting such apprehension .. ..	.. ..	76	.. ..
.. by court-martial in Her Majesty's			
tions where there is no civil judicature			
ce. (See Death, General, 'Court-			
al,' 'Offence,' and Appendix E, p.			
.. .. .	98, 104, 182	.. ..	143
.. out of Her Majesty's dominions ..	99, 104	.. ..	145
.. in the East Indies .. .. .	99, 104	101	144
.. troops in aid of (App. J, p. 360)	30, 187	30	.. ..
NAL, acquittal or conviction by, a bar			
al by court-martial for same offence	98	39	.. ..
.. to cashiering or reduction .. ..	98	39	.. ..
.. ste of conviction or acquittal .. ..	.. ..	39	.. ..
.. tion not to be interfered with	13, 22, 98	.. ..	.. ..
.. tion to this Rule .. .. .	99	.. ..	.. ..
.. ot liable to court-martial .. .. .	94, 133, 140	.. ..	.. ..
ON OF PUNISHMENT .. .. .	26, 27	.. ..	.. ..
.. tions in respect of, how redressed ..	17, 203	.. ..	13
.. possible for discipline of regiment .. {	17, 51, }	.. ..	.. ..
.. g orders of .. .. .	56, 121 }	.. ..	75
.. ler a non-commissioned officer to be	55	.. ..	.. ..
.. ed .. .. .	.. ..	39	137
.. COURT. (See 'Regimental Courts-			
.. al.')			
ND FOREIGN TROOPS serving abroad			
.. object to Mutiny Act and Articles of	34, 96	4	190
.. .. .			
.. disobeying lawful command. (See	30	15	37
.. licence.')			
F THE ARMY in the Crown. (See			
.. 'Commander-in-Chief,' 'General,'	49	.. ..	.. ..
.. er.')			
T OF FORT OR GARRISON .. .. .	50	.. ..	.. ..
.. IN-CHIEF: office of .. .. .	55	.. ..	.. ..
.. station of term .. .. .	.. ..	103	188
.. ty of .. .. .	107	.. ..	.. ..
.. act towards .. .. .	.. ..	.. ..	41
.. inta by officers referred to .. ..	17, 78	.. ..	12

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
<b>COMMANDER-IN-CHIEF—continued.</b>			
May discharge soldiers .. .. .	.. ..	.. ..	22, 23
May reduce non-commissioned officers .. ..	.. ..	39	137
May dispense with trial for desertion .. ..	.. ..	.. ..	47
May, with concurrence of Secretary of State, remit stoppages awarded by court-martial .. ..	.. ..	.. ..	134
May certify for restoration of forfeited service .. ..	12	.. ..	168
May order property to be destroyed .. ..	19, 53, 177	.. ..	103
<b>COMMANDER-IN-CHIEF IN INDIAN PRESIDENCY, as to</b>	174	.. ..	.. ..
May reduce non-commissioned officers .. ..	.. ..	.. ..	137
<b>COMMANDER-IN-CHIEF ON A FOREIGN STATION may</b>			
order person committed as deserter to serve .. ..	.. ..	34	.. ..
May dispense with trial for desertion .. ..	.. ..	.. ..	47
May order convicted deserter to serve in any regiment .. .. .	.. ..	.. ..	42
<b>COMMANDING OFFICER, wrongs done by, how to be complained of .. .. .</b>	17, 203	.. ..	12
Complaint of wrongs as to pay and clothing to be made to .. .. .	17, 203	.. ..	13
Duty of, to maintain order .. .. .	116-8	.. ..	14
Duty of, upon application of magistrate, to deliver up accused soldier .. .. .	98, 117-8	.. ..	17
Power of, to arrest or confine offenders .. ..	109	.. ..	18
Power of, to award imprisonment for 168 hours .. .. .	109	.. ..	50
Power of, to award deprivation of pay for absence .. .. .	109	.. ..	50
Power of, to award fines for drunkenness .. ..	.. ..	.. ..	77, 78
Cannot be member of a regimental court- martial .. .. .	.. ..	.. ..	112
Not to give in vague charges .. .. .	122	.. ..	140
Not to try grave offences by regimental court- martial without permission .. .. .	121	.. ..	140
(See 'General,' and 'Colonel.')			
<b>COMMISSIONED OFFICER. (See 'Officer.')</b>			
<b>COMMISSIONS to execute martial law .. .. .</b>	410	.. ..	.. ..
<b>COMMISSIONS to be entered at War Office .. ..</b>	.. ..	.. ..	27
<b>COMMITTEE OF ADJUSTMENT .. .. .</b>	204	.. ..	.. ..
<b>COMMON LAW COURTS uphold the jurisdiction of</b>	78, 119,	}	.. ..
military courts .. .. .	158-9		
<b>COMMONWEALTH, Army of .. .. .</b>	77	.. ..	.. ..
<b>COMMUTATION OF SENTENCES, of death .. ..</b>	32, 169	16	141
Of penal servitude .. .. .	170	20	142
Of corporal punishment .. .. .	32	24	120
Of cashiering .. .. .	.. ..	25	.. ..
<b>COMPACT, Parliamentary, by the Mutiny Act ..</b>	24	Preamble	.. ..
<b>COMPLAINT of inferior against superior officer ..</b>	92	.. ..	13
<b>COMRADE, stealing from .. .. .</b>	100	.. ..	81
<b>CONCEALMENTS in returns .. .. .</b>	.. ..	.. ..	89
<b>CONDITIONS OF MILITARY SERVICE .. .. .</b>	74	.. ..	.. ..
<b>CONDONATION OF MILITARY CRIME .. .. .</b>	102, 140	.. ..	.. ..
<b>CONFESSION OF DESERTION, proceedings upon ..</b>	112	50	46, 47

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
OF PRISONER .. .. .	146	.. ..	.. ..
IAL REPORT, on political opinions ..	92	.. ..	.. ..
t from .. .. .	147	.. ..	.. ..
s for use of the Crown .. .. .	193, 199, 205	.. ..	.. ..
ST, offence of escaping from .. ..	.. ..	.. ..	69
tacks .. .. .	109-110, 117	.. ..	.. ..
ION OF COURT-MARTIAL PROCEEDINGS,	91, 163	6	123, 124, 127
ssity for .. .. .	163	.. ..	.. ..
responsibility for .. .. .	144, 164	.. ..	.. ..
om .. .. .	165	.. ..	.. ..
of confirming officer .. .. .	171	.. ..	.. ..
re of the court on .. .. .	.. ..	.. ..	.. ..
g OFFICER. (See 'Confirmation,' rts-martial,' 'Revision,')	.. ..	.. ..	.. ..
ffect of prisoner's, on his liability to Mutiny Act. (See 'Waiver,')	95	.. ..	.. ..
IONAL LAWS, sources for information upon	2	.. ..	.. ..
ION OF TERMS used in Articles of War	.. ..	.. ..	188
rd "soldier" in Mutiny Act .. ..	.. ..	67	.. ..
m "commander-in-chief" .. .. .	.. ..	103	.. ..
for military service .. .. .	72, 73	.. ..	.. ..
t by court of ordinary criminal jurisdic- tion, when to be entered in court-martial t or defaulter book .. .. .	.. ..	.. ..	156
Previous Conviction,')	.. ..	.. ..	.. ..
ord, letter of .. .. .	7	.. ..	.. ..
COURT-MARTIAL RECORDS to be obtained	.. ..	.. ..	.. ..
Judge Advocate General .. .. .	172	.. ..	157, 158
ot of court of inquiry .. .. .	199	.. ..	.. ..
JUDGE .. .. .	131	.. ..	.. ..
PUNISHMENT, limitations on power of	26, 33, 155	22, 23	118, 119
t-martial to award .. .. .	33	24	120
utation of .. .. .	.. ..	.. ..	.. ..
Punishment,')	.. ..	.. ..	.. ..
DENCE with the enemy .. .. .	25	15	51
itnesses .. .. .	156	.. ..	.. ..
treble costs to be given .. .. .	.. ..	89	.. ..
t be awarded by court-martial .. ..	131, 156	.. ..	.. ..
cluded from "Court-martial" .. ..	136	.. ..	.. ..
REQUESTS in India .. .. .	102	99	.. ..
INQUIRY to report and advise the Crown	192-204	.. ..	.. ..
er prerogative .. .. .	193	.. ..	.. ..
or administration .. .. .	193-5	.. ..	.. ..
or government .. .. .	194-5	.. ..	.. ..
o the conduct thereof .. .. .	196	.. ..	.. ..
Windham's remarks .. .. .	196	.. ..	.. ..
Charles Napier's remarks .. .. .	196	.. ..	.. ..
open, but confidential courts .. ..	197	.. ..	.. ..
ology to grand jury .. .. .	198	.. ..	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
<b>COURTS OF INQUIRY—continued.</b>			
(2) Under statutory authority .. .. .	200	.. ..	.. ..
(a) On wounded officers .. .. .	201	.. ..	165
(b) On soldiers on discharge .. .. .	201	.. ..	166
(c) On maimed soldiers .. .. .	202	.. ..	82
(d) On illegal absence .. .. .	203	.. ..	167
(e) To redress wrongs .. .. .	ib.	.. ..	13
(f) Under Volunteer Act .. .. .	204	.. ..	.. ..
<b>COURTS-MARTIAL, general orders relating to, by</b>			
James II. .. .. .	87	.. ..	.. ..
Regulations of. (See Appendix D and E, pp. 311, 325.) .. .. .	317	.. ..	.. ..
"Forms and Charges," Appendix F and G (pp. 326-347) .. .. .	326	.. ..	.. ..
Legal agents excluded from .. .. .	131	.. ..	.. ..
Proceedings initiated by superior officer ..	91	.. ..	.. ..
(a) Convening of court :	58, 91, 92	.. ..	.. ..
Decision of General as to convening any and which court .. .. .	121-22	.. ..	140
Serving on, a military duty. (See Ap- pendix D.) .. .. .	127, 132-3 150-79	.. ..	.. ..
Courts of honour .. .. .	129, 149	.. ..	.. ..
Courts of Record .. .. .	136	.. ..	.. ..
Open courts .. .. .	136	.. ..	.. ..
Records of extant .. .. .	3, 22, 53, 88, 192	.. ..	.. ..
Permanent courts established by James II.	88	.. ..	.. ..
Established for the public safety .. ..	78	.. ..	.. ..
Advice of Judge Advocate General on pro- ceedings .. .. .	108-56, 122	.. ..	.. ..
Exclusive jurisdiction of .. .. .	78, 91, 98- 100, 132	.. ..	.. ..
Separate jurisdiction of each .. .. .	57	.. ..	.. ..
Courts of the military hierarchs respon- sible for discipline .. .. .	57, 116, 164	.. ..	.. ..
Summoned as wanted .. .. .	58	.. ..	.. ..
No officer has a right to .. .. .	81	.. ..	.. ..
Legal responsibility of members .. .. .	131	.. ..	.. ..
General, history of .. .. .	14, 16, 58, 86-91, 121	.. ..	.. ..
Regimental court .. .. .	59	.. ..	.. ..
Analogy to judge and jury .. .. .	120	12	.. ..
Detachment general, see (b) <i>post</i> .. ..	99, 182	.. ..	.. ..
District, history of .. .. .	58	.. ..	.. ..
Regimental (detachment court) history of	11, 14, 16, 57, 59, 121, 187	11	.. ..
Commission and warrants for convening, &c. (See 'Warrant.') .. .. .	58	6	110, 111, 112, 113
Time within which court should be con- vened .. .. .	102, 189	97	18
Place where crime committed immaterial	102-3, 189	7	.. ..
Trial of civil offences in India .. .. .	175	101	144
Trial of civil offences elsewhere .. .. .	98, 103	.. ..	143, 145
None on ships of war .. .. .	104, 112	.. ..	191
(Appendix H, p. 318.)			
(b) Composition of court :			
As to legal quorum .. .. .	21, 122, 150	10, 12	112, 116, 197



	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
<b>COURT-MARTIAL—continued.</b>			
<b>Composition of court:</b>			
Of general court-martial .. .. .	21, 22, 84, 90	8	106, 114, 146-151
Of detachment general court-martial ..	59, 99, 182	12	107, 114, 108, 109, 111, 114, 146-151
Of district or garrison court-martial ..	.. ..	9	112, 114, 113, 114
Of regimental court-martial .. .. .	14	10	.. ..
Of detachment court-martial .. .. .	14	10	.. ..
Of drum-head court-martial .. .. .	59, 182	11	.. ..
<b>c) Proceedings of court:—general history of ..</b>	87, 123	.. ..	.. ..
May be stayed by the Crown .. .. .	142	.. ..	100
Hours of sitting .. .. .	21, 137	.. ..	160
Power to have view .. .. .	.. ..	.. ..	160
Challenges by prisoner .. .. .	127	.. ..	152
Causes of .. .. .	128	.. ..	.. ..
Swearing of members .. .. .	21, 129	.. ..	152
As to their oath .. .. .	16, 129	.. ..	.. ..
Summoning and swearing of witnesses ..	143	13	153
Employment of shorthand writer .. ..	16	13	.. ..
Defence of previous acquittal or conviction for same offence. (See 'Acquittal.') ..	141	14, 39	163
Proceedings to continue after expiration of Mutiny Act .. .. .	102	97	.. ..
If prisoner is a marine, proceedings to follow Marine Mutiny Act .. .. .	107	.. ..	146
After conviction of prisoner, evidence of previous convictions to be received ..	153	.. ..	154-156
Summary power to punish contempt of court.	143	.. ..	161
Maintenance of order in court .. .. .	131, 136	.. ..	162
Publication of proceedings .. .. .	139	.. ..	.. ..
Youngest member to vote first .. .. .	17, 150	.. ..	162
Deliberation of .. .. .	132, 149	.. ..	.. ..
All obliged to vote .. .. .	149-50	.. ..	.. ..
As to the finding .. .. .	150	.. ..	.. ..
May embrace the conduct of all military persons .. .. .	150, 171	.. ..	.. ..
As to honourable acquittal .. .. .	151	.. ..	.. ..
As to guilty or not guilty .. .. .	151	.. ..	.. ..
Review thereof by confirming officer ..	166	.. ..	.. ..
As to sentence .. .. .	154	.. ..	.. ..
All members vote on same .. .. .	154	.. ..	.. ..
Distinction between verdict .. .. .	156	.. ..	.. ..
Review thereof by confirming officer ..	167	.. ..	.. ..
<b>d) Powers of sentence:</b>			
General court-martial .. .. .	155	8, 26	115
Detachment general court-martial .. ..	.. ..	12	124
District or garrison court-martial .. ..	.. ..	9, 26	117
Regimental or detachment court-martial	.. ..	10, 27	129
<b>e) Provisions as to special punishments:</b>			
Death. (See 'Death.') .. .. .	155	8, 9, 12, 15	115, 116, 117, 121
Penal servitude (ib.) .. .. .	.. ..	8, 15, 17, 28	115, 116, 117, 124, 138, 139
Imprisonment (ib.) .. .. .	.. ..	8, 26, 27, 28	121, 122, 126, 129, 138, 139

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
<b>COURTS-MARTIAL—continued.</b>			
<i>Provisions as to special punishments:</i>			
Corporal punishment ( <i>ib.</i> ) .. .. .	155	22, 23	118, 119, 128
Fines for drunkenness .. .. .	.. ..	8, 9	77, 78
Stoppages of pay for losses, &c. .. ..	.. ..	8, 9, 10, 60	130, 131
Forfeiture of advantages of service, medals, &c. .. .. .	155	.. ..	117
Discharge with ignominy .. .. .	.. ..	.. ..	117
Reduction, &c. of commissioned officers ..	87	.. ..	125
Dismissal, &c. of warrant officer .. ..	50	.. ..	128
Reduction, &c. of non-commissioned officers	.. ..	.. ..	137
(f) <i>Revision and confirmation:</i> .. .. .	.. ..	11, 12,	123, 124, 127, 129,
<i>(See these Titles in Index.)</i>	.. ..	14	135, 143, 145, 163
(g) <i>Commutation of sentence:</i> .. .. .	165, <i>et seq.</i>	17, 20, 21, 24, 25	120, 141, 142, 143, 145
(h) <i>Execution of Sentence:</i> .. .. .	157, 168,	.. ..	.. ..
Penal servitude .. .. .	170	.. ..	.. ..
Imprisonment .. .. .	171	18, 19, 31	.. ..
Discharge .. .. .	170	30, 31	139
(i) <i>Suspension of proceedings by presidential     government in India</i> .. .. .	142	100	.. ..
Proceedings to be transmitted to Judge Advocate General .. .. .	172	.. ..	157
Under martial law .. .. .	186	.. ..	.. ..
CREDIT, crying down .. .. .	101	.. ..	7
CRIMES, civil. <i>See Civil Offences and Tribunals,</i> <i>'Exemptions,' and Appendix E, p. 324.)</i> ..	97-8	.. ..	.. ..
CRIMINAL, protection of .. .. .	170	.. ..	.. ..
CROWN, supreme authority of, over the army ..	4, 31, 49, 107, 170	.. ..	.. ..
Regard to be had thereto .. .. .	9, 13	.. ..	.. ..
Personal command of the sovereign .. ..	30, 51, 55, 75	.. ..	.. ..
Engagement of the army with. ( <i>See 'Oath.'</i> )	72, 73, 74	.. ..	.. ..
Administering justice in the army .. ..	91, 165, 170	.. ..	.. ..
Power to make Articles of War ceded to ..	29	1	.. ..
Power to stay court-martial proceedings ..	142	.. ..	100
Power of, over auxiliary forces .. ..	62	.. ..	.. ..
CRUELTY triable as disgraceful conduct .. ..	.. ..	.. ..	81
CUSTODY of offenders under the control of Com- manding officer .. .. .	116	.. ..	.. ..
By commanders of guard .. .. .	114	.. ..	19
Of deserters in gaols .. .. .	.. ..	35	.. ..
CUSTOM, Lord Thurlow as to .. .. .	42 note, 129	.. ..	.. ..
DEATH, early history of military punishment ..	9	.. ..	.. ..
In Charles I.'s reign .. .. .	11	.. ..	.. ..
In Charles II.'s reign .. .. .	16	.. ..	.. ..
In William III.'s reign .. .. .	21	.. ..	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
<b>EATH—continued.</b>			
In Anne's reign .. .. .	26	.. ..	.. ..
In George I.'s reign .. .. .	27, 30	.. ..	.. ..
In the American Code .. .. .	40	.. ..	.. ..
Sentence of, not to be awarded, except in pursuance of the Mutiny Act .. .. .	29	1	189
Not to pass unless two-thirds of the court concur .. .. .	21	8	116
Not to be awarded except by a general or detachment general court-martial .. ..	.. ..	9	117
The power of the general officer .. .. .	9	.. ..	.. ..
For what crimes awardable .. .. .	.. ..	15	{ 36, 37, 38, 42, 51-58
Mode of, decided by court .. .. .	155	.. ..	.. ..
May be commuted by confirming officer ..	169	16	141
May be ordered by court .. .. .	161	.. ..	.. ..
In colonial possessions to be approved of by civil governor .. .. .	170, 175	.. ..	123
<b>EST</b> , taking of soldier out of the service for ..	14, 22, 101	40	.. ..
Regimental Debts Act .. .. .	204	98	28
When recoverable in military court of re- quests. (See 'Exemption.') .. .. .	31, 101	99	.. ..
Civil, recovery of .. .. .	101	.. ..	.. ..
<b>EVENCE OF PRISONER</b> .. .. .	148-9	.. ..	.. ..
<b>POSITIONS.</b> (See 'Affidavits.')			
<b>PRIVATION OF LIQUOR</b> by commanding officer .. ..	.. ..	.. ..	78, 179
<b>PRIVATION OF PAY</b> by the Crown .. .. .	34, 73	.. ..	.. ..
Summary power of, by commanding officer ..	.. ..	.. ..	50
By court-martial for drunkenness .. .. .	.. ..	.. ..	77, 78
Stoppages for loss of necessaries, &c. .. ..	.. ..	.. ..	130, 131
Limit of stoppages. (See 'Pay.') .. .. .	.. ..	.. ..	132
<b>SCRIPTIVE RETURNS</b> of deserters .. .. .	.. ..	34	.. ..
<b>SETER</b> , formerly a felon .. .. .	313	.. ..	.. ..
Punishment of .. .. .	21, 33	15	42
By fraudulent enlistment .. .. .	.. ..	15	42
After fraudulent enlistment .. .. .	.. ..	.. ..	49
Soldier confessing desertion, how dealt with ..	112	50	45, 46, 47
Civilian, fraudulently confessing desertion ..	.. ..	37	.. ..
Apprehension of deserters .. .. .	112	34	.. ..
Transfer and trial of soldiers committed as deserters .. .. .	.. ..	34	.. ..
Custody of deserters in gaols .. .. .	.. ..	35	.. ..
Descriptive return .. .. .	.. ..	34	.. ..
Transfer and trial of recruits deserting be- fore joining regiment .. .. .	.. ..	36	.. ..
Offence of soldier advising another soldier to desert .. .. .	.. ..	.. ..	44
Offence of entertaining deserter .. .. .	.. ..	.. ..	44
Prisoner charged with desertion may be found guilty of absence without leave .. .. .	153	.. ..	43
Several charges of desertion allowed on one arraignment .. .. .	.. ..	.. ..	49
Desertion not to be tried by regimental court- martial .. .. .	.. ..	.. ..	136
Record of regimental court of inquiry admis- sible on trial .. .. .	203	.. ..	167

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
<b>DESERTER—continued.</b>			
If deserter not retaken, record to have the legal effect of a conviction for desertion ..	203	.. ..	167
Convicted deserter may be ordered to serve in any corps .. .. .	.. ..	.. ..	42
<b>DETACHMENT GENERAL COURT-MARTIAL.</b> (See 'Court-martial.')			
<b>DETENTION</b> of Prisoner limited .. .. .	14	.. ..	.. ..
<b>DEVIL'S ARTICLE</b> .. .. .	12, 18, 40	.. ..	105
<b>DISBANDMENT OF FORCES.</b> (See 'Dismissal.')	53, 92, 125	.. ..	.. ..
<b>DISCHARGE</b> , power of .. .. .	54, 74	.. ..	20-23
Certificate of discharge .. .. .	.. ..	.. ..	21
Regimental board, previous to .. .. .	201	.. ..	23, 166
In cases of wilful mutilation, &c., discharge to be refused .. .. .	202	.. ..	82, 83
Crime of using false documents to obtain discharge .. .. .	.. ..	.. ..	86, 87
<b>DISCHARGE WITH IGNOMINY</b> .. .. .	87	.. ..	117
Forfeiture of service, &c., upon .. .. .	.. ..	.. ..	168
<b>DISCHARGE</b> of Prisoners. (See 'Prisoners.')			
<b>DISCIPLINE</b> , military rules of James II. ..	86	.. ..	.. ..
Maintained by court-martial .. .. .	{ 7, 56-7, 58, 79, 91, 122, 172 }	.. ..	.. ..
Offences to the prejudice of .. .. .	12, 18, 40	.. ..	105
Definition of .. .. .	75	.. ..	.. ..
<b>DISEASE</b> , crime of feigning .. .. .	202	.. ..	81
<b>DISGRACEFUL CONDUCT</b> , offence of .. ..	100, 202	.. ..	79-90
Stoppages for loss, or damage occasioned by .. .. .	.. ..	.. ..	130
<b>DISMISSAL FROM ARMY</b> , no legal remedy ..	54, 74	.. ..	.. ..
<b>DISOBEDIENCE</b> to lawful command, &c. (See 'Obedience,' and 'Orders.')	74	15	38
<b>DISTRICT</b> , for command at home, .. .. .	53, 56	.. ..	.. ..
Meaning of, in Articles, as applied to India .. .. .	.. ..	.. ..	187
<b>DISTRICT COURT-MARTIAL.</b> (See 'Court-martial.')			
<b>DISTURBING PROCEEDINGS OF COURT-MARTIAL</b> ..	131	.. ..	161
<b>DIVINE WORSHIP</b> , importance of, under the { Military Code .. .. .	{ 9, 10, 16, 36 }	.. ..	.. ..
Offences respecting .. .. .	.. ..	.. ..	31
<b>DIVISION</b> , offence of quitting .. .. .	.. ..	.. ..	70
<b>DOCUMENTS</b> , offence of rendering false docu- ments, &c. .. .. .	.. ..	.. ..	84-90
Production of .. .. .	147, 172	.. ..	.. ..
<b>DRILL</b> , punishment by .. .. .	75, 110	.. ..	.. ..
<b>DRUM-HEAD courts-martial</b> .. .. .	59, 182	11	.. ..
<b>DRUNKENNESS</b> , punishments for .. .. .	.. ..	.. ..	76-78
<b>DUEL</b> , offence of fighting or promoting a duel ..	.. ..	.. ..	76
<b>DURATION</b> of Mutiny Act .. .. .	.. ..	102	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
ENT of stores, &c., intrusted .. ..	78	.. ..	80, 81, 88
ences before. (See 'Field') .. ..	72-74	.. ..	.. ..
r, obligations under .. ..	19	.. ..	.. ..
court-martial proceedings, as to .. ..	78 158-9, 165, 167	.. ..	.. ..
ence of suffering prisoner to escape ..	113	.. ..	78
d, General of the Parliamentary Army	84	.. ..	.. ..
s of War by .. ..	10	.. ..	.. ..
EMENT of Army .. ..	25	.. ..	.. ..
mode of taking .. ..	87-90, 144-5	.. ..	.. ..
ation of, prohibited .. ..	139	.. ..	.. ..
of evidence. (See Appendix I, p. 349.)	145, 158	.. ..	.. ..
. (See 'Court-martial,' 'Provost.') ntence of regimental or detachment t-martial on line of march, &c. ..	59, 182	11	.. ..
ntence of a detachment general court- tial .. ..	28, 182	12	.. ..
t of Army from process civil .. ..	13, 14, 17, 22, 53, 101	40	.. ..
process criminal .. ..	14, 18-19, 22, 88, 97-100	76	.. ..
ice of tampering with, &c. .. ..	202	.. ..	81, 83
OUNTS .. ..	.. ..	.. ..	87, 88, 89
XTICATION, punishment of .. ..	17	.. ..	.. ..
STERS .. ..	55	.. ..	80
URNS,—OF STATE .. ..	.. ..	.. ..	84
statements to obtain pension, discharge, Returns of Stores, &c. .. ..	.. ..	88	86, 87
crime of feigning disease .. ..	202	.. ..	81
soldier may be taken out of the service .. ..	97-101	40, 70	17
ces of felonious nature triable as dis- ceful conduct .. ..	99	.. ..	81
ture of service, &c. on conviction for ..	33	.. ..	100
tion declared .. ..	.. ..	.. ..	.. ..
nces in the— sponding with the enemy, &c. .. ..	25	10	81, 88
having before the enemy, &c. .. ..	27	10	84, 88, 89
(See 'Courts-martial' and 'Revision.') w of by confirming officer .. ..	150, 3 165	.. ..	.. ..
Drunkenness .. ..	.. ..	.. ..	77, 78
prisoners of war .. ..	180	.. ..	.. ..
nds. (See 'Household Troops.') 'moors, when subject to Mutiny Act and icles of War .. ..	32, 90	4	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
FOREIGNERS excluded from command .. .. .	54	.. ..	.. ..
FORFEITURE of service towards pay and pension, &c., by express sentence of court-martial .. ..	.. ..	.. ..	117
Consequent upon conviction, &c., in certain cases .. .. .	168	.. ..	168
Restoration of forfeited service .. .. .	12	.. ..	169
FORTS, government of .. .. .	49-50	.. ..	.. ..
Adjutant of .. .. .	49-50	.. ..	.. ..
FRANCE, military law in 1672 .. .. .	84-86	.. ..	.. ..
FRAUD, offences of a fraudulent nature triable as disgraceful conduct .. .. .	100	.. ..	81
FRAUDULENT CONFESSION OF DESERTION .. ..	.. ..	37	46
FRAUDULENT ENLISTMENT .. .. .	76	.. ..	42, 49
FRAUDULENT MISAPPLICATION OF MONEY .. ..	.. ..	.. ..	81, 88
FRAYS .. .. .	111	.. ..	15, 40
FURLOUGH, granting of .. .. .	.. ..	.. ..	5
Extension of .. .. .	.. ..	38	5
Liability to Mutiny Act on .. .. .	95	.. ..	.. ..
GAOLS, imprisonment of soldiers in .. .. .	11-14, 86	.. ..	.. ..
GARRISONS of Charles II. .. .. .	49-50	.. ..	.. ..
Governor of .. .. .	49-50	.. ..	.. ..
Abolished .. .. .	56	.. ..	.. ..
Duty of officer commanding, as to sutlers, &c. .. .. .	34	.. ..	67
Breach of garrison orders .. .. .	13, 50	.. ..	75
Battalions .. .. .	49	.. ..	.. ..
GATES OF FORT, closing of .. .. .	51	.. ..	.. ..
GAYA, DE, Work on Military Law .. .. .	85	.. ..	.. ..
GENERAL COURT-MARTIAL. (See 'Court-martial.')			
GENERAL, command of army by .. .. .	52, 170	.. ..	.. ..
Command of district .. .. .	56, 121	.. ..	.. ..
Duty and authority of .. .. .	75	.. ..	.. ..
"      "      upheld by the Military Code .. .. .	10	.. ..	.. ..
Power of life and death given to .. .. .	5, 7-9, } 92, 157 }	.. ..	.. ..
Power to make Articles of War .. .. .	7, 22, 108	.. ..	.. ..
Power over auxiliary forces .. .. .	62-71	.. ..	.. ..
His court-martial. (See 'General Court- martial.')			
His decision on the court which is to be summoned .. .. .	121	140	.. ..
GIBBET, erection of .. .. .	5-9	.. ..	.. ..
GOOD-CONDUCT BADGE, forfeiture of .. .. .	155	.. ..	117, 168
GOVERNOR of fort or garrison .. .. .	49-50	.. ..	.. ..
GOVERNOR-GENERAL in India .. .. .	172, 174	.. ..	.. ..
GRAND JURORS, duties of .. .. .	130, 189, } 199 }	.. ..	.. ..
GRAVE OFFENCES, trial of .. .. .	.. ..	.. ..	140

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
CARD, OFFICER COMMANDING, to receive prisoners	14, 114	.. ..	19
And to report them .. .. .	14, 113	.. ..	72
Offence of releasing prisoner without autho- rity, or suffering him to escape	113	.. ..	73
.. leaving guard .. .. .	.. ..	.. ..	65
GUARDS to the sovereign. (See 'Household Troops.') .. .. .	13-49	.. ..	.. ..
GUARDS AND GARRISONS .. .. .	13-49, 51	.. ..	.. ..
LABOUR CORPUS, application for writ of .. ..	118, 157-8	.. ..	.. ..
Application for writ of, to bring up witness	142	.. ..	.. ..
LALE, Sir Matthew, opinions of .. .. .	96, 132, 134, 179, 188	.. ..	.. ..
HALF-PAY OFFICERS not liable to the Mutiny Act	32-34, 96	.. ..	.. ..
LANDWRITING, proof of .. .. .	148	.. ..	.. ..
'HANDY STROKES,' coming to .. .. .	12	.. ..	.. ..
IRRAWAY EVIDENCE. (Appendix I, p. 321.) ..	146	.. ..	.. ..
HIRING; offence of hiring a substitute .. ..	.. ..	.. ..	101
HORSE, offence of ill-treating, &c. .. ..	.. ..	.. ..	102
HORSE GUARDS, room at. (See 'Household Troops.')	89, 108	.. ..	.. ..
HOSPITAL APPRENTICE, how punishable by court- martial .. .. .	.. ..	.. ..	128
LOT IRON, punishment by .. .. .	9, 12	.. ..	.. ..
HOUSEHOLD TROOPS, constitution of courts-martial in .. .. .	.. ..	.. ..	147-149
Rank of officers of .. .. .	.. ..	.. ..	181-183
Under the personal command of the king ..	51	.. ..	.. ..
IMMORALITIES made punishable by court-martial	26, 98, 144	.. ..	.. ..
IMPRISONMENT may be awarded by any court- martial .. .. .	33, 170	26, 27	.. ..
Not to exceed two years .. .. .	.. ..	8	116
Sentence generally to be reckoned from day of president's signature .. .. .	.. ..	.. ..	139
May, however, be awarded to commence at the expiration of a former sentence .. ..	.. ..	28	138
May be carried out in a public prison .. ..	171	30	.. ..
Temporary imprisonment of offenders on line of march, &c. .. .. .	.. ..	30	.. ..
Summary power of, by commanding officer ..	109	.. ..	50
Solitary confinement .. .. .	171	26, 27	121, 122, 126
INDECENCY punishable as disgraceful conduct ..	.. ..	.. ..	81
INDEPENDENT COMPANIES .. .. .	53, 55	.. ..	.. ..
INDIA, natives of, soldiers of Her Majesty's Indian army, to be tried under Indian Articles of War .. .. .	39, 175	1	.. ..
Oath of .. .. .	15	.. ..	.. ..
Military courts of requests in .. .. .	102	99	.. ..
Trial of civil offences by court-martial in ..	98	101	.. ..
European army in .. .. .	173-6	.. ..	.. ..

	Pages of Text	Sections of Mutiny Act.	Numbers of Articles War.
INDIAN FORCES subject to Mutiny Act .. .. .	39, 173	2	187
Proceedings of Indian court-martial may be suspended by presidential government .. ..	142	100	.. ..
Complaint by any officer of .. .. .	.. ..	100	.. ..
Indian Staff Corps, punishment of officers in	.. ..	.. ..	125
INFORMER, Judge Advocate formerly was such before courts-martial .. .. .	11-16, 89, } 116	.. ..	.. ..
INSPECTING OFFICERS .. .. .	55, 92	.. ..	.. ..
INSUBORDINATION; in false accusations .. ..	78	.. ..	.. ..
Using violence, &c. to superior officer in execution of his office .. ..	.. ..	15	37
" " to superior officer .. ..	.. ..	.. ..	41
Using threatening or insubordinate language	.. ..	.. ..	41
Disobeying lawful command .. .. .	30	15	38
Using traitorous language. (See 'Sedition'.)	.. ..	.. ..	39
Behaving with contempt to Commander-in- Chief .. .. .	.. ..	.. ..	41
Using violence to visitor of military prison ..	.. ..	15	37
INTERRUPTION of court-martial proceedings ..	138	.. ..	161
INVALID BATTALIONS .. .. .	32, 49	.. ..	.. ..
IRELAND, martial law in .. .. .	27-29, 84, } 177	.. ..	.. ..
Mutiny Act extended to .. .. .	23, 25	.. ..	.. ..
IRONS, confinement in .. .. .	113	.. ..	.. ..
JAMES II., Army of .. .. .	53	.. ..	.. ..
Articles of War of .. .. .	18-9, 53, 177	.. ..	.. ..
Rules of Discipline of .. .. .	87	.. ..	.. ..
JERSEY, GUERNSEY, &c., certain provisions of Mutiny Act apply to .. .. .	.. ..	3	.. ..
JUDGE ADVOCATE GENERAL. (See 'Informer,' and 'Prosecutor.') Not a judge .. ..	17, 108, } 116, 126	.. ..	.. ..
History of office in Charles I.'s reign .. ..	11, 12	.. ..	.. ..
" in Charles II.'s reign .. ..	13, 16, 18, } 116	.. ..	.. ..
" in William III.'s reign .. ..	108	.. ..	.. ..
" in later reigns .. .. .	108, 125	.. ..	.. ..
In India .. .. .	173	.. ..	.. ..
To advise on proceedings of general and district courts-martial .. .. .	108, 122, } 164	.. ..	.. ..
To preserve same .. .. .	172	.. ..	157
To furnish copy of such proceedings on application of party tried .. .. .	173	.. ..	158
JUDGE ADVOCATE at general court-martial to sum- mon witnesses .. .. .	142	13	153
Oath to be taken by .. .. .	126	.. ..	152
Not to be prosecutor or witness for prosecution	121, 126	.. ..	159
His functions at a trial (Appendix E, p. 293)	126	.. ..	.. ..
No challenge against .. .. .	126	.. ..	.. ..
No witness for the Crown but for Prisoner ..	126	.. ..	.. ..
Recorder of the court .. .. .	126	.. ..	.. ..



	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
JUDGES declare martial law illegal .. .. .	8, 177	.. ..	.. ..
Advice of .. .. .	133, 163	.. ..	.. ..
No action against .. .. .	79, 135	.. ..	.. ..
JURISDICTION of courts-martial .. .. .	78, 97, } 132, 165 }	.. ..	.. ..
Concurrent in military and civil courts ..	97-9, 133	.. ..	.. ..
JUSTICE IN THE ARMY, administered by officer ..	79, 107, 120	.. ..	.. ..
JUSTICES. (See 'Civil Magistrates.')			
KIRKE, Colonel, martial law enforced by .. ..	53	.. ..	.. ..
KIT; stoppages for free kit fraudulently obtained	.. ..	.. ..	130
Loss of deserter's kit to be recorded by Court of Inquiry .. .. .	.. ..	.. ..	167
LAW. (See 'Civil Offences,' and 'Tribunals,' and 'Exemption.')			
When soldiers liable to process of .. ..	97, 101	40, 76	17
Officers refusing to deliver soldiers to pro- cess of .. .. .	98	76	17, 96, 97
LAW OFFICERS, advice of .. .. .	134, 164	.. ..	.. ..
LAWFUL ORDER. (See 'Obedience.')	30, 77	15	38
LEAVE, officer or soldier on, when liable to Mutiny Act .. .. .	95	.. ..	.. ..
LEGAL liability for exercise of authority .. ..	57, 115, } 131, 162, } 361 }	.. ..	.. ..
LETTER OF SECRETARY FOR WAR made evidence	.. ..	37	.. ..
LIX SCRIPTA .. .. .	74	.. ..	.. ..
LIX NON SCRIPTA .. .. .	76	.. ..	.. ..
LIABILITY OF OFFICER ATTENDING COURTS-MARTIAL	132	.. ..	.. ..
LIFE, sentence by court-martial not .. .. .	135, 171	.. ..	.. ..
LIFE, lotting for .. .. .	33	.. ..	.. ..
LIFE AND DEATH. (See 'Officer,' and 'General.')			
LIFE AND LIMB, punishments affecting .. ..	7, 9, 13, 14, } 19, 21, 26, } 27, 30, 33, } 66, 139, } 149, 167 }	Preamble	.. ..
LIFE GUARDS. (See 'Household Troops.')			
LIMITATION OF ACTIONS .. .. .	27	89	.. ..
LIMITATION OF TIME IN TRIAL BY COURT-MARTIAL	102, 140	97	.. ..
LOCAL, military crime not .. .. .	103	.. ..	.. ..
LOCALIZATION of regiments .. .. .	29, 56	.. ..	.. ..
LONDON, Tower of .. .. .	51	.. ..	.. ..
LOST LIEUTENANTS, power of, extinguished ..	62	.. ..	.. ..
LOSING; offence of losing by neglect arms, &c. ..	.. ..	.. ..	102
Deserter's kit to be recorded by Court of Inquiry .. .. .	.. ..	.. ..	167
LOYALTY, sworn to duty of .. .. .	9, 10, 11	.. ..	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
<b>MAIMING</b> , crime of wilfully maiming, &c. . . . .	202	.. ..	81
Offender not to be discharged .. .. .	.. ..	.. ..	82
Court of Inquiry, as to .. .. .	202	.. ..	82
Forfeitures on conviction for .. .. .	.. ..	.. ..	168
Restoration of forfeited service .. .. .	.. ..	.. ..	168
<b>MAJOR</b> , town or fort .. .. .	51	.. ..	.. ..
Regimental prosecutor .. .. .	85-6, 126	.. ..	.. ..
<b>MAKING AWAY WITH ARMS</b> , &c., offence of ..	100	.. ..	15, 16, 102
<b>MALICIOUSLY DESTROYING PROPERTY</b> , offence of	19, 53, 177	.. ..	103
<b>MALINGERING</b> , crime of .. .. .	202	.. ..	81
<b>MARCH</b> , offences committed on the line of march	59, 99, 132	11, 30	135
<b>MARINE</b> , to be tried under Marine Mutiny Act .. .. .	38, 46	.. ..	146
Marine officer may sit upon a court-martial .. ..	.. ..	.. ..	146
To observe Queen's Regulations .. .. .	107	.. ..	157
Soldiers serving as .. .. .	104	.. ..	191
<b>MARLBOROUGH</b> , Duke of, terms of his commission .. ..	23, 26	.. ..	.. ..
Against localization of regiments .. ..	29	.. ..	.. ..
<b>MARSHAL AND CONSTABLE</b> , court and office of ..	9, 11, 83, 116, 165	.. ..	.. ..
<b>MARTIAL LAW</b> , as affected by the Mutiny Act ..	20, 25, 55, 179	.. ..	.. ..
History of, in Charles I.'s reign .. .. .	4, 12, 176-7	.. ..	.. ..
" in James II.'s reign .. .. .	19, 177	.. ..	.. ..
" abroad .. .. .	18, 98, 177	.. ..	.. ..
General statement as to .. .. .	177, 190	.. ..	.. ..
Vote taken for .. .. .	178	.. ..	.. ..
Differs from Military Law .. .. .	178, 183	.. ..	.. ..
Proclamation of .. .. .	179, 187	.. ..	.. ..
Military officer to carry out .. .. .	179, 186	.. ..	.. ..
" responsibility of .. .. .	189	.. ..	.. ..
As applicable to the army .. .. .	180	.. ..	.. ..
Law officer's advice on .. .. .	181	.. ..	.. ..
As applicable to the whole community .. ..	183	.. ..	.. ..
Should be regulated by authority .. .. .	183, 187	.. ..	.. ..
Rules laid down in America (1863) .. ..	185	.. ..	.. ..
Trial of persons under .. .. .	188	.. ..	.. ..
(See 'Provost Marshal'.)			
<b>MEDALS</b> are forfeited—			
On conviction for desertion .. .. .	.. ..	.. ..	168
" " wilful maiming, &c. . . . .	.. ..	.. ..	168
" " tampering with eyes, &c. . . . .	.. ..	.. ..	168
" " felony by any court of .. .. .	.. ..	.. ..	168
ordinary criminal jurisdiction .. .. .	.. ..	.. ..	168
By sentence to penal servitude .. .. .	.. ..	.. ..	168
" " discharge with ignominy .. ..	.. ..	.. ..	168
May be forfeited by—			
Express sentence of a general district court-martial .. .. .	.. ..	.. ..	117
Offence of spoiling, &c. .. .. .	.. ..	.. ..	102
Stoppages for making away with, &c. . . . .	.. ..	.. ..	130
Medal in such case not to be replaced .. ..	.. ..	.. ..	133
Under Regimental Debt Act .. .. .	374	.. ..	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
MEDICAL BOARD OF INQUIRY .. .. .	201	.. ..	165
MEDICAL OFFICER in garrison .. .. .	50	.. ..	.. ..
MEMBERS OF COURT-MARTIAL, actions against (See 'President.') .. .. .	79, 135	.. ..	.. ..
Serve as a military duty. (See Appendix D.) .. .. .	79, 127 161, 165, 168, 170	.. ..	.. ..
MERCY, the Crown the source of .. .. .	{	.. ..	.. ..
MILITARY CODE IN ENGLAND, history of, from 1629-1688 .. .. .	9-19	.. ..	.. ..
After the Mutiny Act .. .. .	20-40	.. ..	.. ..
MILITARY DISCIPLINE of James II. .. .. .	87	.. ..	.. ..
Offences to the prejudice of .. .. .	12, 87, 40	.. ..	105
Institutions .. .. .	2, 22	.. ..	.. ..
MILITARY ORGANIZATION .. .. .	9-48, 60	.. ..	.. ..
MILITARY PRISON: .. .. .	9, 171	.. ..	.. ..
Assaulting visitor of .. .. .	.. ..	15	37
Provisions as to .. .. .	.. ..	29	.. ..
To be deemed a public prison within meaning of Mutiny Act .. .. .	.. ..	29	.. ..
Aiding prisoners to escape from .. .. .	.. ..	83	.. ..
Bringing forbidden things into or out of .. .. .	.. ..	83	.. ..
Power of visitors, governor, &c. .. .. .	170	83	.. ..
Provisions of other Acts applicable to .. .. .	.. ..	83	.. ..
MILITIA, service in garrison .. .. .	49	.. ..	.. ..
Oath of in Charles II.'s reign .. .. .	12	.. ..	.. ..
Service of embodied .. .. .	66	.. ..	.. ..
To observe the regulations and orders of the army .. .. .	66	.. ..	.. ..
Not subject to Mutiny Act except as specially provided .. .. .	{ 12, 23, 58, 61 }	5	.. ..
Rank of militia officers .. .. .	63	.. ..	{ 186 and note
Militia officers not to sit on court-martial for trial of any soldier serving in other forces .. .. .	.. ..	.. ..	151
Militia-man to be tried by militia officers only .. .. .	{ 62, 132	.. ..	151
" enlisting in the army triable for desertion, or to be punished by stoppages Militia may be attached to regular forces .. .. .	.. ..	50 105	45
Reserve liable to Mutiny Act .. .. .	61 70	.. ..	.. ..
MISDEMEANOUR, taking soldier out of service for .. .. .	101	40, 76	17
MITIGATION OF PUNISHMENT .. .. .	169	.. ..	.. ..
MIXTURE of officers on courts-martial .. .. .	.. ..	.. ..	146
MONMOUTH'S REBELLION, Articles of War in force .. .. .	19, 53, 177	.. ..	103
MOUTH, meaning of, in Articles of War .. .. .	.. ..	.. ..	188
MURDER, not triable under the Mutiny Act. (See Appendix E, p. 324.) .. .. .	18	.. ..	.. ..
" except abroad .. .. .	98	.. ..	.. ..
Crime of, by proceeding in error or without jurisdiction .. .. .	132, 134	.. ..	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
MUSTERS, when to be taken .. .. .	55	.. ..	1
Penalty for mustering or being mustered falsely .. .. .	.. ..	.. ..	84, 85
MUTINY, punishment of .. .. .	16, 19, 22	15	36
When triable by regimental or detachment court-martial .. .. .	121, 122	11, 22	118, 132
MUTINY ACT, history of, William III.'s reign. (See Appendix A, p. 207)	19, 23	.. ..	.. ..
History of, in Anne's reign .. .. .	23-7	.. ..	.. ..
" in George I.'s reign .. .. .	27-32	.. ..	.. ..
" in later reigns .. .. .	26, 34	.. ..	.. ..
" in 1872 (in notes) .. .. .	212-249	.. ..	.. ..
Preamble of .. .. .	21-25	.. ..	.. ..
Political virus of .. .. .	19-21	15	.. ..
Passing of, opposed in Parliament .. ..	31, 37	.. ..	.. ..
No controversial matters should be included	37	.. ..	.. ..
Originates in the Commons .. .. .	37	.. ..	.. ..
Persons subject to .. .. .	93, 95	2	.. ..
Applicable to Her Majesty's Indian forces except natives .. .. .	39, 173	1, 2	.. ..
" " colonial and foreign troops ..	96	4	.. ..
Certain provisions of, apply to Jersey, Guern- sey, &c. .. .. .	.. ..	3	.. ..
Operation of, not local .. .. .	103	.. ..	.. ..
Does not extend to militia or yeomanry or volunteers, except as specially provided ..	12, 22, 29	5	.. ..
Interpretation clauses .. .. .	.. ..	67, 103	.. ..
Trial of offences against former Mutiny Act	102	97	.. ..
Duration of .. .. .	.. ..	102	.. ..
NAPIER, Sir Charles, opinions of .. .. .	125-6, 129, 172, 183, 196	.. ..	.. ..
NAVAL CODE .. .. .	41-8	.. ..	.. ..
NAVAL OFFICERS, authority over the military on ships of war .. .. .	104	.. ..	191
Order in council. (See Appendix H, p. 347.)	.. ..	.. ..	.. ..
NAVY, a constitutional force .. .. .	29	.. ..	.. ..
NON-COMMISSIONED OFFICER included in the term soldier .. .. .	.. ..	67	.. ..
Committing a prisoner to the guard must sign charge against him .. .. .	113, 114	.. ..	19
May be reduced by sentence of court-martial	86	.. ..	137
" " by commander-in-chief or colonel .. .. .	.. ..	39	137
Not to strike a soldier .. .. .	.. ..	15, note, 37	100
May be tried by regimental court-martial for drunkenness .. .. .	.. ..	.. ..	78
NORTHUMBERLAND, Earl of, Commander of Nor- thern Army in 1639 .. .. .	7	.. ..	.. ..
NOLLE PROSEQUI, entry of .. .. .	141, 164, 189	.. ..	.. ..
NOT GUILTY, plea of .. .. .	140	.. ..	.. ..
NUMBER OF TROOPS, limited .. .. .	24	Preamble.	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
<b>OATHS OF ALLEGIANCE</b> .. .. .	11, 16, 18, 29	.. ..	.. ..
Of obedience .. .. .	11, 14, 15	.. ..	.. ..
Of militia .. .. .	14, 18	.. ..	.. ..
Of witnesses at courts-martial .. ..	143	13	153
Of " " Boards .. .. .	203	.. ..	167
Of shorthand writer .. .. .	.. ..	13	.. ..
Of officers and witnesses of Court of Re- quests .. .. .	16	99	.. ..
" " serving on courts-martial .. ..	129	.. ..	152
Affirmations in lieu of .. .. .	201, 202	13, 96	153
Administration of oaths by justices .. ..	.. ..	96	.. ..
Punishment of perjury .. .. .	143, 144	96	35
Of Judges. (See Court-martial.)			
Of secrecy .. .. .	{ 126, 130, 196 }	.. ..	152
<b>OBEDIENCE, law of</b> .. .. .	{ 10, 30, 56, 75, 76, 78 }	15	38
To military tribunals .. .. .	78	.. ..	.. ..
In time of martial law .. .. .	189	.. ..	.. ..
Justification of subordinate .. .. .	115-364	.. ..	.. ..
<b>OFFENCES, proceedings on commission of</b> .. ..	{ 107, 109, 115 }	.. ..	17, 18, 19
(See 'Civil Offences.')			
<b>OFFENDERS against the law of the land to be delivered over to civil magistrate. (See Appendix E, p. 324)</b> .. .. .	99	40, 76	17, 96, 97
When to be put in arrest .. .. .	110	.. ..	18
To be tried or discharged from arrest within reasonable time .. .. .	14, 115	.. ..	18
<b>OFFICER, power over life and limb ceded to</b> .. ..	{ 7, 8, 9, 91-2, 157 }	.. ..	.. ..
To govern the soldier .. .. .	8	.. ..	.. ..
Engagement with the Crown .. .. .	{ 72, 73, 74, 75 }	.. ..	.. ..
No commissioned officer in full pay to be sheriff, mayor, &c. .. .. .	.. ..	41	.. ..
Regimental pay of .. .. .	.. ..	.. ..	2
Complaint by .. .. .	17, 78	100	12
Not to strike a soldier .. .. .	.. ..	15 note	37, 100
Power of, to quell quarrels .. .. .	78	.. ..	5, 40
Not to use provoking speeches or gestures to another .. .. .	77, 79	.. ..	16
If charged with an offence to be put in arrest And to be tried or discharged within reason- able time .. .. .	113-114 14, 116	.. ..	18 18
If sentenced to penal servitude ceases to belong to the service .. .. .	.. ..	.. ..	20
If convicted of scandalous conduct to be cashiered .. .. .	.. ..	.. ..	79
May be reduced by sentence of court-martial	.. ..	.. ..	125
Officer of guard to report prisoners committed to him .. .. .	14, 113 114	.. ..	72
Not to release prisoners without authority .. ..	113 114	.. ..	73
Not to suffer prisoners to escape .. .. .	113	.. ..	73
If his character is publicly impugned must submit the case to his commanding officer	.. ..	.. ..	99
Board of medical inquiry on wounded officer	201	.. ..	105

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
<b>OFFICERS—continued.</b>			
Secretary of State may withhold pay of officer absent from duty .. .. .	73	.. ..	175, 176
OPINION, when evidence .. .. .	202	.. ..	.. ..
ORDER, maintenance of .. .. .	111	.. ..	14-16
Breach of garrison or other orders .. ..	51, 14	.. ..	38, 75
Offences to the prejudice of .. .. .	13, 40, 87	.. ..	105
ORDERS must be within the scope of the officer's authority. (See 'Obedience.') .. .. .	30, 77	15	38
ORDNANCE, principal officers of .. .. .	50	.. ..	.. ..
Warrant officers of .. .. .	50	.. ..	.. ..
Charge of forts .. .. .	51	.. ..	.. ..
OVER AND TERMINER, commission of .. .. .	25, 27, 84	.. ..	.. ..
PARADE, offence of not appearing at .. .. .	.. ..	.. ..	70
Officer on .. .. .	56	.. ..	.. ..
Regiments for the detection of criminals ..	278	.. ..	96
PARDON, by the Crown .. .. .	54, 168, 169	.. ..	.. ..
PARLIAMENT, functions of, towards the army ..	54	.. ..	.. ..
Consent to standing army .. .. .	53, 54	.. ..	.. ..
Privilege of, no exemption from Mutiny Act	112	.. ..	.. ..
PAROLE, officer on, not liable to the Mutiny Act	96	.. ..	.. ..
execution of one breaking .. .. .	366-7	.. ..	.. ..
PARTY SPIRIT in the army condemned .. ..	77	.. ..	.. ..
PAWNING, offence of pawning arms, &c. ..	99	.. ..	102, 130
PAY, no action for .. .. .	72, 73	.. ..	.. ..
Deprivation of, by order of commanding officer .. .. .	73	.. ..	50, 174, 179
Deprivation of, for drunkenness .. .. .	.. ..	.. ..	77, 78
Stoppages of, for loss or damage, &c. ..	99-100	.. ..	130
Soldier to be left one penny per day .. ..	.. ..	.. ..	132
What absence from duty forfeits right to pay	.. ..	.. ..	170-174
Power of Secretary of State for War as to pay	72, 73	.. ..	175, 176, 177, 178
Wrongs in respect of pay, how redressed ..	17, 70, 203	.. ..	13
Meeting to demand, punishable .. .. .	11, 16	.. ..	.. ..
Pay not to be issued to officers absent with- out leave .. .. .	.. ..	.. ..	2
PEACE, 1st M. A. in time of .. .. .	26	.. ..	.. ..
PEEL, Sir Robert, opinion of .. .. .	76	.. ..	.. ..
PENAL SERVITUDE, not to be imposed except for crimes so punishable by the Mutiny Act ..	171	1	189
What crimes punishable with .. .. .	.. ..	15, 17	36-38, 42, 51-58
Sentence of, not to be for a period of less than five years .. .. .	.. ..	8	116
" " not to be passed by a district or garrison court-martial .. .. .	.. ..	9	117
Execution of sentence passed in United Kingdom .. .. .	.. ..	18	.. ..
Certificate to be sufficient proof of sentence	.. ..	18	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
<b>PENAL SERVITUDE—continued.</b>			
Execution of sentence passed out of United Kingdom .. .. .	.. ..	19	.. ..
Sentence of, may be commuted to imprisonment .. .. .	169	20	142
to be reckoned generally from date of President's signature .. .. .	.. ..	.. ..	139
May, however, be awarded to commence at the expiration of a former sentence .. ..	.. ..	28	138
Commissioned officer sentenced to, is thereby discharged .. .. .	.. ..	.. ..	20
Soldier sentenced to, may be at once discharged .. .. .	.. ..	.. ..	23
forfeits former service for pay and pension, also medals, &c. ..	.. ..	.. ..	168
<b>PENINSULAR WAR.</b> (See 'Wellington.')			
<b>PENNY,</b> meaning of, in India .. .. .	.. ..	.. ..	188
<b>PENSION.</b> (See 'Service' towards pay and pension.)			
<b>PERJURY,</b> crime of .. .. .	144	96	35
<b>PERMANENT LAW</b> for the army .. .. .	2, 3, 29	.. ..	.. ..
<b>PETITION OF RIGHT</b> .. .. .	5, 177	.. ..	.. ..
<b>PIQUET,</b> offence of leaving .. .. .	.. ..	.. ..	65
<b>PLATOON,</b> offence of quitting .. .. .	.. ..	.. ..	70
<b>PLEADING</b> at courts-martial .. .. .	140	.. ..	.. ..
General issue .. .. .	.. ..	89	.. ..
<b>PLUNDER,</b> offence of .. .. .	.. ..	.. ..	53, 58
<b>POLITICAL ACTION OF THE ARMY</b> .. .. .	55	.. ..	.. ..
Condemned .. .. .	77	.. ..	.. ..
Offences punished under the Mutiny Act ..	20-21, 32, 78, 90	.. ..	.. ..
Virus of the Mutiny Act .. .. .	20, 21-23	15	.. ..
Opinions of the army .. .. .	77, 92	.. ..	.. ..
<b>POST,</b> crime of leaving or sleeping upon .. ..	.. ..	15	37
<b>PRACTICE,</b> rule of courts-martial .. .. .	135	.. ..	.. ..
<b>PREAMBLE</b> of the M. A. .. .. .	21, 25	1	.. ..
<b>PREROGATIVE,</b> as to execution of justice .. ..	54, 91, 165, 170	.. ..	.. ..
<b>PRESIDENT</b> of a court-martial .. .. .	120, 124	.. ..	162
General history of his office .. .. .	12, 16, 17, 19, 87, 122	.. ..	.. ..
As to casting vote of .. .. .	16, 151	.. ..	162
Power to clear the court .. .. .	124, 136	.. ..	.. ..
Ruling as to admission of evidence .. ..	122, 143	.. ..	.. ..
Takes the votes of the members .. .. .	122, 150	.. ..	162
Revision of sentence .. .. .	168	.. ..	.. ..
Regulations as to appointment of .. .. .	.. ..	.. ..	114
Appointment of, where court-martial arises out of disputes between different corps .. ..	.. ..	.. ..	148
Challenge of, by the prisoner .. .. .	127	.. ..	152
To be responsible for the order of the court .. .. .	124	.. ..	162

	Pages of Text.	Sections of Munby Act.	Numbers of Articles of War.
<b>PRESIDENT—continued.</b>			
Duties of .. .. .	124, 129	.. ..	.. ..
To sign sentence .. .. .	.. ..	.. ..	139
Cannot confirm proceedings .. .. .	156	.. ..	.. ..
Of district court-martial to transmit the proceedings to the Judge Advocate General .. .. .	.. ..	.. ..	157
As to his death, during the trial .. .. .	156	.. ..	.. ..
Members under his command .. .. .	124	.. ..	162
Action at law against .. .. .	33	.. ..	.. ..
<b>PREVIOUS CONVICTION</b>			
Admissible in evidence .. .. .	153	.. ..	154
By court-martial, how proved .. .. .	.. ..	.. ..	155
By civil court, how proved .. .. .	.. ..	39	156
<b>PRINTED ARTICLES OF WAR, date of .. .. .</b>	4	.. ..	.. ..
<b>PRISONER IN MILITARY PRISON, offences by .. .. .</b>	.. ..	15, 83	37
<b>PRISONER OF WAR not liable to court-martial .. .. .</b>	97	.. ..	.. ..
Offence of being taken prisoner by want of due precaution .. .. .	.. ..	.. ..	65
To be tried by court-martial on his return .. .. .	.. ..	.. ..	171
May be brought up as a witness .. .. .	142	.. ..	.. ..
<b>PRISONER ON DETENTION to be received by officer of guard .. .. .</b>	14, 132	.. ..	19
Charge to be signed by committing officer .. .. .	14, 114	.. ..	19
Officer commanding guard to report .. .. .	114	.. ..	72
Offence of releasing without authority, or suffering to escape .. .. .	113-114	.. ..	73
May be a witness .. .. .	142	.. ..	.. ..
To be brought to trial or released within a reasonable time .. .. .	114	.. ..	18
Offence of unnecessarily detaining prisoner without bringing him to trial .. .. .	115	.. ..	74
Commanding officer has the legal control of .. .. .	116	.. ..	.. ..
To be present during trial .. .. .	139	.. ..	.. ..
To have names of witnesses .. .. .	140	.. ..	.. ..
To be heard in his defence .. .. .	149-150	.. ..	.. ..
<b>PRISONERS UNDER SENTENCE, provisions for removal or discharge of, from prison .. .. .</b>	.. ..	31, 84	.. ..
Detention in military custody to count towards sentence .. .. .	.. ..	31	.. ..
May be subjected to necessary restraint during detention and removal .. .. .	171	31	.. ..
Subsistence of, in public prisons .. .. .	.. ..	32, 35	.. ..
Expiration of sentence to be notified to military authority .. .. .	.. ..	33	.. ..
<b>PRIVILEGED COMMUNICATION, evidence .. .. .</b>	147, 198	.. ..	.. ..
<b>PROCEEDINGS of general and district courts-martial to be transmitted to the Judge Advocate General .. .. .</b>	173	.. ..	157
Copy to be had on application .. .. .	.. ..	.. ..	158
<b>PRODUCTION of official documents .. .. .</b>	{ 148, 152, 194-195 }	.. ..	.. ..
<b>PROHIBITION, writ of .. .. .</b>	134, 158	.. ..	.. ..
<b>PROPERTY, destruction of, by military order .. .. .</b>	53, 177	.. ..	103



	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
PROSECUTOR, Judge Advocate formerly such ..	16, 126	.. ..	159
May be a witness for the prisoner .. ..	128	.. ..	.. ..
PROTESTANT AND ROMAN CATHOLIC, dispute of ..	89	.. ..	.. ..
PROVISIONS, sale of .. .. .	.. ..	.. ..	67
PROVOKING SPEECHES, offence of .. .. .	77, 138	.. ..	16
PROVOST MARSHAL, history of office .. .. .	9	.. ..	.. ..
In Charles I.'s reign .. .. .	12	.. ..	.. ..
In Charles II.'s reign .. .. .	16	.. ..	.. ..
In later reigns .. .. .	181	.. ..	.. ..
General duties of .. .. .	.. ..	.. ..	164
" " to receive prisoners .. .. .	.. ..	.. ..	19
" " to execute sentence .. .. .	9, 170, } 181 }	.. ..	.. ..
Offence of impeding provost marshal .. ..	17	.. ..	68
PUBLICATION of evidence during trial .. .. .	139	.. ..	.. ..
PUNISHMENTS, MILITARY, history of, in Charles I.'s reign. (See 'Death.') .. .. .	9, 11, 30	.. ..	.. ..
In Charles II.'s reign .. .. .	17	.. ..	.. ..
In James II.'s reign .. .. .	18	.. ..	.. ..
In William III.'s reign .. .. .	23, 34	.. ..	.. ..
In Anne's reign .. .. .	23	.. ..	.. ..
In George I.'s reign .. .. .	27, 101	.. ..	.. ..
In other reigns .. .. .	48	.. ..	.. ..
Severity increased under the Mutiny Act ..	90	.. ..	.. ..
Voting on .. .. .	154	.. ..	.. ..
Increase of, on revision .. .. .	164-165	.. ..	.. ..
To be consistent with legal usage .. .. .	145	.. ..	.. ..
Summary, under martial law .. .. .	155, 181	.. ..	.. ..
By the officers insisted on .. .. .	8	.. ..	.. ..
QUALIFICATION for court-martial duty .. .. .	132	.. ..	.. ..
QUARRELS, quelling of .. .. .	112	.. ..	15, 40
QUESTIONS at courts-martial .. .. .	21, 123, 151	10, 12 }	107, 112, 116
RANK and duty inseparable .. .. .	57	.. ..	.. ..
Of Artillery officers on courts-martial ..	34	.. ..	150
Regimental and brevet .. .. .	.. ..	.. ..	180
Of life guards and horse guards doing duty together .. .. .	.. ..	.. ..	181
Of household troops doing duty with other troops .. .. .	.. ..	.. ..	181
Of different regiments of life guards doing duty together .. .. .	.. ..	.. ..	182
Of different regiments of foot guards doing duty together .. .. .	.. ..	.. ..	183
Of Her Majesty's Indian army .. .. .	35	.. ..	184
Of provincial officers .. .. .	63	.. ..	185
Of militia, yeomanry, and volunteers .. ..	63	.. ..	186
RANK, offence of leaving, in action .. .. .	.. ..	.. ..	64
RATION, forfeiture of liquor ration, &c. .. ..	.. ..	.. ..	.. ..
REBELS, property of, to be destroyed .. .. .	53, 177	.. ..	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
REBELLION of 1715-1716 .. .. .	{ 24, 26, 27, } 34	.. ..	.. ..
Of 1745-1746, inquiry after .. .. .	194	.. ..	.. ..
RECEIVING; offence of receiving goods, knowing them to be stolen .. .. .	.. ..	.. ..	81
RECOMMENDATIONS by courts-martial .. .. .	165	.. ..	.. ..
RECORD of general courts-martial made by Judge Advocate .. .. .	.. ..	.. ..	.. ..
Of other courts by President .. .. .	.. ..	.. ..	.. ..
Form of. (See Appendix F, p. 299.)			
RECORDS of marshal's court .. .. .	11	.. ..	.. ..
RECORDS, custody of by the War Office formerly	3	.. ..	.. ..
Custody of, by the Judge Advocate General	173	.. ..	157
Production of .. .. .	173	.. ..	158
Of a Court of Inquiry, not produced .. .. .	197	.. ..	.. ..
RECRUITING unlawfully .. .. .	.. ..	80	.. ..
Offences in respect of .. .. .	.. ..	51	95
RECRUITS, moral character of, in former times ..	54, 99	.. ..	.. ..
Desertion of, before joining regiment .. ..	.. ..	36	.. ..
Transfer and punishment of such deserters	.. ..	36	.. ..
When triable before two justices or a court- martial .. .. .	.. ..	48	.. ..
Transfer of recruits, concealing infirmity ..	.. ..	.. ..	3
REDEESS of wrongs to officers and to non-com- missioned officers and soldiers .. .. .	17	.. ..	12, 13
RE-ENLISTMENT, concealment on .. .. .	.. ..	.. ..	4
REGIMENT, entering garrison or district .. ..	51	.. ..	.. ..
Discipline of .. .. .	9, 14, 17	.. ..	.. ..
Meaning of, in articles .. .. .	.. ..	.. ..	188
REGIMENTAL ARTICLES, offence of making away with, &c. .. .. .	100	.. ..	102
Stoppages for making away with .. .. .	.. ..	.. ..	130
REGIMENTAL COURT - MARTIAL. (See 'Court- martial.')			
Debts Act, 1863. (See Appendix J, p. 327.)	203	98	28
REGULATIONS, standing, by the sovereign .. ..	55-57, 108	.. ..	.. ..
To be obeyed by the royal marines .. ..	38, 39	.. ..	157
" " militia .. .. .	64	.. ..	.. ..
In India .. .. .	176	.. ..	.. ..
By the general .. .. .	{ 56, 57, } 176	.. ..	.. ..
By the colonel .. .. .	56, 57	.. ..	.. ..
Relating to court-martial procedure. (See Appendix D and E, pp. 284, 285.)			
RELEASE, offence of releasing prisoners without authority .. .. .	113	.. ..	73
RELIGIOUS WORSHIP .. .. .	9, 15, 36	.. ..	31
REMARKS by courts-martial on witnesses or prose- cutor .. .. .	172	.. ..	.. ..
REMOVAL of prisoners. (See 'Prisoners.')			

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
REPRIEVE by the Crown .. .. .	165	.. ..	.. ..
REQUESTS, Court of.. .. .	102	99	.. ..
RESERVE FORCE not liable to Mutiny Act, except as specially provided .. .. .	{ 12, 22, 29, 68 }	5	.. ..
RESPONSIBILITY, chain of .. .. .	{ 56, 57, 115 }	.. ..	.. ..
RETURNS of state to be made.. .. .	.. ..	.. ..	{ 24, 25, 26, 29 }
Offence of not making due return .. ..	.. ..	.. ..	84
,, making false return .. ..	.. ..	.. ..	84-90
REVENUE, "public" and "private" .. ..	54	.. ..	.. ..
REVIEW of courts-martial, record by the con- firming officer. (See 'Court-martial' and 'Revision.') .. .. .	165-168	.. ..	.. ..
REVIEWING GENERALS employed by the Crown..	55, 92	.. ..	.. ..
REVISION of Court-martial Sentences .. ..	11	.. ..	.. ..
Instituted by William III. .. .. .	{ 23-24, 90-157 }	.. ..	.. ..
Purpose of .. .. .	165, 167	.. ..	.. ..
No second revision allowed .. ..	.. ..	14	163
No additional evidence to be received on (See 'Courts-martial,' 'Confirmation.')	.. ..	14	163
REVOLUTION of 1688 .. .. .	19-20	.. ..	.. ..
RIGHTS, Bill of.. .. .	54	.. ..	.. ..
Petition of .. .. .	5, 177	.. ..	.. ..
RIFLE, military used in .. .. .	30, 186	30	.. ..
ROLL CALL .. .. .	117	.. ..	.. ..
ROYAL MARINES. (See 'Marine.')			
History of.. .. .	38	.. ..	.. ..
Liability to Mutiny Act .. .. .	38	.. ..	.. ..
,, to Queen's Regulations .. ..	39	.. ..	.. ..
RUFERT, Prince, Articles of War by .. ..	17	.. ..	.. ..
SANDALOUS CONDUCT, offence of .. ..	.. ..	.. ..	79
SCHOMBERG, Duke of, commission of .. ..	8	.. ..	.. ..
SCHOOL, absence from .. .. .	.. ..	.. ..	32
SCHOOLMASTER not to be reduced to the ranks ..	.. ..	.. ..	137
SECRETARY AT WAR, office of .. .. .	52	.. ..	.. ..
SECURITY by military store officer .. ..	.. ..	2	.. ..
SENTENCE, punishment of .. .. .	{ 11, 13, 16-19 }	.. ..	.. ..
SELLING, offence of selling arms, &c. .. ..	100	.. ..	102
SENTENCE OF COURT-MARTIAL summary. (See 'Court-martial' and 'Confirmation.')	14, 151-155	.. ..	.. ..
Review of, by confirming officer .. ..	168	.. ..	.. ..
SENTINEL, authority of .. .. .	111, 180	.. ..	.. ..
Leaving or sleeping on post .. ..	.. ..	15	.. ..
SETTLEMENT of soldier .. .. .	.. ..	.. ..	37

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
SERVICE TOWARDS PAY AND PENSION, forfeiture of, to follow conviction in certain cases ..	.. ..	.. ..	168
Service so forfeited may be restored .. ..	12	.. ..	169
Forfeiture of, by sentence of general or district court-martial ..	.. ..	.. ..	117
" " on trial for desertion being dispensed with .. ..	.. ..	.. ..	47
Soldier not allowed to count service whilst in confinement under a sentence of any court .. ..	.. ..	.. ..	170
Or during any commitment or con- finement as a deserter by confession .. ..	.. ..	.. ..	170
Or during confinement on any charge on which he is afterwards convicted .. ..	.. ..	.. ..	170
Or whilst in confinement for debt .. ..	.. ..	.. ..	170
Or during absence as prisoner of war .. ..	.. ..	.. ..	171
" " desertion or absence with- out leave, if convicted .. ..	.. ..	.. ..	172
" " imprisonment by command- ing officer .. ..	.. ..	.. ..	173
Soldier confessing desertion from Militia or Volunteer Permanent Staff to reckon ser- vice from expiration of former engage- ment .. ..	.. ..	50	.. ..
Service to be recorded by Regimental Board previous to soldier's discharge .. ..	201	.. ..	166
SERVICE TOWARDS DISCHARGE of men who enlisted from militia before the year 1860 .. ..	.. ..	50	.. ..
SERVILE EMPLOYMENTS, punishment for .. ..	12	.. ..	82
SHIP, punishment of offences committed on board	104-105	11, 22	{ 118, 135, 179
Troops embarked on ships of war or trans- port ships to be, for certain purposes, under command of the senior officer of the ship. (Appendix II, p. 319.) .. ..	35, 104, 112	.. ..	191
SHORTHAND WRITER at courts martial .. ..	16	13	.. ..
SOLDIERS to include non-commissioned officers ..	73	67	.. ..
Engaged by the Crown .. ..	72	.. ..	.. ..
SOLITARY CONFINEMENT may be awarded by courts-martial .. ..	.. ..	26, 27	.. ..
Limits of .. ..	171	.. ..	121, 126
SPIES, alien, liability to Mutiny Act .. ..	97	.. ..	.. ..
SPOILING ARMS, offence of .. ..	100	.. ..	11, 102
STAFF OFFICERS of a fort or garrison .. .. (See Adjutant.)	50	.. ..	.. ..
STANDING ARMY, consent of Parliament thereto	13	.. ..	.. ..
Reasons for its continuance .. ..	24	.. ..	.. ..
Limitation in the numbers .. ..	24	Preamble.	.. ..
Objected to in Parliament .. ..	13	.. ..	.. ..
STATE, Act of .. ..	57, 115, 164	.. ..	.. ..
STATUS, civil .. ..	{ 112, 133, 140 }	.. ..	.. ..
STEALING, offence of .. ..	100	.. ..	80, 81

	Pages of Text	Sections of Mutiny Act	Numbers of Articles of War.
STOPPAGES of soldier confessing himself a militiaman or non-commissioned officer in Volunteer Permanent Staff .. .. .	.. ..	50	.. ..
Awarded by Court of Requests .. .. .	102	99	.. ..
To pay fines for drunkenness .. .. .	.. ..	.. ..	77
For wife's maintenance .. .. .	.. ..	.. ..	177
To make good moneys embezzled .. .. .	100	17	80, 130
To make good losses, &c. .. .. .	100	.. ..	130
Soldier to be left one penny a day .. .. .	.. ..	.. ..	132
Stoppages may be remitted by the Commander-in-Chief and Secretary of State for War.. .. .	.. ..	.. ..	134
TRAPPADO, punishment by .. .. .	9	.. ..	.. ..
TRAGGLERS, punishment of, by provost-martial.. .. .	299	.. ..	164
TRIKING : offence of striking a soldier .. .. .	.. ..	.. ..	100
Offence of striking a superior officer .. .. .	.. ..	15	37, 41
TCARTS, army of .. .. .	52, 84	.. ..	.. ..
URDISTRICT BRIGADES .. .. .	62	.. ..	.. ..
UBORDINATION of authority .. .. .	{ 74, 76, 86, 115-19 }	.. ..	.. ..
UICIDE, offence of attempting .. .. .	.. ..	.. ..	104
UMMARY PUNISHMENT by commanding officer .. .. .	{ 109, 116, 117 }	.. ..	{ 50, 77, 78, 174 }
History of.. .. .	{ 5, 9-18, 54, 79, 84 }	.. ..	.. ..
UPERIOR OFFICER, striking, disobeying, threatening, &c. (See 'Insubordination.')	.. ..	.. ..	.. ..
SUPPLIES, offence of irregularly appropriating .. .. .	.. ..	.. ..	66
SUPPLY, vote in, for the army .. .. .	54	.. ..	.. ..
SUSPENSION of officer, liability to Mutiny Act during .. .. .	96	.. ..	.. ..
Of court-martial proceedings .. .. .	142	100	.. ..
UTLERS, liability to Mutiny Act .. .. .	94	.. ..	.. ..
UTTLING .. .. .	.. ..	.. ..	6, 67
TAKEN OUT OF THE SERVICE, for what causes soldiers may be .. .. .	10	40, 76	.. ..
TAMPERING; crime of tampering with eyes, &c. .. .. .	202	.. ..	81
How offender is to be dealt with .. .. .	.. ..	.. ..	83
Offender on conviction forfeits former service, &c. .. .. .	.. ..	.. ..	168
Such forfeited service may be restored .. .. .	12	.. ..	168
TIME of punishment .. .. .	12	.. ..	.. ..
TONE'S CASE .. .. .	118, 150	.. ..	.. ..
TONGUE, branding of .. .. .	9	.. ..	.. ..
TORTS, actions for, by or against soldiers .. .. .	17, 79, 80	.. ..	12, 13
TOWER OF LONDON, closing gates of .. .. .	51	.. ..	.. ..
Guards in .. .. .	52	.. ..	.. ..
Garrison of .. .. .	56	.. ..	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
TOWN MAJOR .. .. .	50	.. ..	.. ..
TRAITOROUS WORDS, use of ( <i>See</i> 'Sedition.') ..	11 13	.. ..	39
TRANSFER of persons committed as deserters ..	.. ..	34	.. ..
Of convicted deserters .. .. .	.. ..	54	42
Of recruits concealing infirmity .. .. .	.. ..	.. ..	3
TRIAL of offenders to be within reasonable time			
from date of arrest .. .. .	114	.. ..	18
Postponement of .. .. .	130	.. ..	.. ..
No second trial .. .. .	140	14	.. ..
TROOP SHIP, offences on board. ( <i>See</i> 'Ship' and 'Navy.' Appendix H, p. 319.) .. .. }	107	11, 22	{ 118, 135, 179
TRUCE, sending flag of .. .. .	170	.. ..	59
UNITY of command .. .. .	107	.. ..	.. ..
UNNATURAL ACT triable as disgraceful conduct	.. ..	.. ..	81
USAGE, Lord Thurlow as to .. .. .	{ 42 note, 104, 112, } 129	.. ..	.. ..
VAGUE charges forbidden .. .. .	122	.. ..	140
VIEW: Court-martial may have view of place ..	.. ..	.. ..	160
VOLUNTEER OFFICERS, rank of .. .. .	63	.. ..	186
Not under Mutiny Act, except as specially provided .. .. .	64-68	5	.. ..
Non-commissioned officers of permanent staff, fraudulently enlisting of .. .. .	.. ..	50	.. ..
Volunteers may be attached to Regular Forces .. .. .	.. ..	106	.. ..
VOLUNTEERS formerly serving in the army liable to Mutiny Act .. .. .	31	.. ..	.. ..
Exemption from civil process .. .. .	101	.. ..	.. ..
Courts of Inquiry as to .. .. .	204	.. ..	.. ..
VOTES at courts-martial .. .. .	151, 154	.. ..	162
WAIVER of objection. ( <i>See</i> 'Consent.') .. .. }	{ 128, 134, 140 note }	.. ..	.. ..
WAR, all orders to be obeyed in .. .. .	75	.. ..	.. ..
WARRANT for convening court-martial .. .. }	{ 21, 58, 89 }	.. ..	.. ..
In India .. .. .	174	.. ..	.. ..
WARRANT OFFICER, what .. .. .	50	.. ..	.. ..
By what court triable .. .. .	.. ..	.. ..	111, 114
Sentence upon .. .. .	.. ..	.. ..	128
May be reduced or remanded to regimental duty by Presidential Government in India	.. ..	.. ..	128
WATCHWORD, making known .. .. .	.. ..	.. ..	54
Giving wrong watchword .. .. .	.. ..	.. ..	60
WELLINGTON, Duke of .. .. .	5	.. ..	.. ..
Definition of discipline .. .. .	75	.. ..	.. ..
Opinion on necessity for obedience to regu- lations in war .. .. .	75	.. ..	.. ..
Detachment general court-martial recom- mended by .. .. .	99	.. ..	.. ..

	Pages of Text.	Sections of Mutiny Act.	Numbers of Articles of War.
Against party spirit and newspaper reports	77	.. ..	.. ..
Orders soldiers to lot for life .. ..	33	.. ..	.. ..
Commuted capital punishment .. ..	33	.. ..	.. ..
Rank and duty inseparable .. ..	57	.. ..	.. ..
Advantage of religious instruction to the army .. ..	36	.. ..	.. ..
As to condonation of military crime .. ..	102	.. ..	.. ..
As to jurisdiction of civil courts over the army abroad .. ..	103	.. ..	.. ..
Authority of a sentinel .. ..	111	.. ..	.. ..
As to power to confine to barracks .. ..	117-118	.. ..	.. ..
Against swearing witnesses at regimental courts .. ..	144	.. ..	.. ..
As to taking evidence by affidavit .. ..	145, 203	.. ..	.. ..
As to honourable acquittal .. ..	151	.. ..	.. ..
As to remitting court-martial sentences .. ..	165	.. ..	.. ..
Censures the members of a court-martial .. ..	172	.. ..	.. ..
As to martial law .. ..	181, 184	.. ..	.. ..
Regulates provost-marshal's office .. ..	182	.. ..	.. ..
WILLIAM III., army under .. ..	54, 55	.. ..	.. ..
Articles of War of .. ..	54-99, } 194 note }	.. ..	.. ..
WILLS to be registered in the Marshal's Court ..	11	.. ..	.. ..
WITNESS ordered out of court .. ..	136, 139	.. ..	.. ..
To be examined on oath or by solemn affir- mation .. ..	143	13	153
General method and rules of examination ..	145, 147	.. ..	.. ..
Summoning of, for general court-martial ..	142	13	153
" " for any other court-martial .. ..	142	13	153
Costs of .. ..	156	.. ..	.. ..
Privileged from arrest .. ..	142	13	.. ..
Prisoners may be brought up as .. ..	142	31	.. ..
Witness for prosecution not to act as Judge Advocate .. ..	127	.. ..	159
Member of court for Prisoner .. ..	197, 202	.. ..	.. ..
Before courts of inquiry .. .. (Appendix I, p. 321.)	197, 202	.. ..	.. ..
WOODEN HORSE, Punishment of .. ..	12	.. ..	.. ..
WOUNDS; Board of Inquiry on wounded officer ..	201	.. ..	165
WRONGS, redress of .. ..	17, 79, 91	.. ..	12, 13
YAR; meaning of .. ..	.. ..	.. ..	188
YEOMANRY, not liable to Mutiny Act unless as specially provided .. ..	12, 66, 68, } 81-83 }	5	.. ..
Rank of Yeomanry officers .. ..	63	.. ..	186
May be attached to Regular Forces .. ..	.. ..	106	.. ..





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The following table shows the results of the experiment:

Time (min)	Concentration (M)
0	0.100
10	0.080
20	0.064
30	0.051
40	0.041
50	0.033
60	0.026
70	0.021
80	0.017
90	0.014
100	0.011

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